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Supreme Court, U.S.
FILED

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In The

Supreme Court of the United States

R. VANKE, et al.,

Petitioners,

vs.

LEROY BACA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the Prison Litigation Reform Act of 1995 section 1997e(d)'s attorney's fees provisions apply to prisoners' section 1983 actions that do ***not*** involve prison conditions?

LIST OF PARTIES

Petitioners are R. Vanke on behalf of a class of similarly situated persons.

Respondent is LeRoy Baca who succeeded to defendant upon original defendant Sherman Block's death.

Los Angeles County Board of Supervisors were defendants in the lower court.

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PETITION FOR WRIT OF CERTIORARI

Petitioners, plaintiffs R. Vanke, *et al.*, petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The memorandum disposition of the Court of Appeals is reported at 77 Fed. Appx. 948 (9th Cir. 2003), Appendix A hereof; the district court fees opinion is reported at 2002 WL 1836305 (C.D. Cal. 2002), Appendix B hereof; the district court class certification, preliminary injunction disposition is not published and is set forth at Appendix C hereof; and the order denying rehearing and rehearing *en banc* is set forth in Appendix D hereof.

JURISDICTION

The disposition of the Court of Appeals was rendered on October 9, 2003, a timely petition for rehearing with a suggestion for rehearing *en banc* was filed on October 21, 2003 and was denied on November 17, 2003, and this Petition timely is filed within 90 days' of the order denying rehearing with suggestion for rehearing *en banc*. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

42 U.S.C. § 1997e(d)

1997e Suits by prisoners

(a) Applicability of administrative remedies

No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

****

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that –

. . .

STATEMENT

Petitioners alleged they previously were confined at the Los Angeles County jail, and previously had been ordered released by Los Angeles Superior Court judges, but that, notwithstanding those release orders, and in contravention of those orders, Petitioners had not been released and had been continued in detention, in accordance with an unconstitutional jail policy.

Petitioners, who continued in confinement, sought injunctive relief only and class certification, and were

successful in obtaining both class certification and a preliminary injunction that prevented defendant Los Angeles County sheriff from again refusing to release a jail detainee whose release had been ordered by a court.

Defendant admitted, in support of his summary judgment motion, that he had changed his release policy to bring it into accord with the preliminary injunction, and, based on this representation, the district court decertified the class and vacated the preliminary injunction.

Plaintiffs moved under the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988(b), for an award of attorneys' fees, and that motion was granted. The district court found that the provisions of section 1997e(d) did ***not*** apply to the action because the case did ***not*** involve any prison conditions.

Defendant appealed the attorneys' fees award. The court below held that the PLRA's attorneys' fees provision, 42 U.S.C. § 1997e(d), was applicable, notwithstanding that the suit did ***not*** involve prison conditions, and held that since plaintiffs had not demonstrated that they had suffered an "actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988," 42 U.S.C. § 1997e(d)(1)(A), therefore, plaintiffs were not entitled to the fees award. The fees award was vacated.

REASONS FOR GRANTING THE PETITION

1. The issue presented in this Petition is of overarching national importance because it affects suits brought by prisoners who do ***not*** complain about prison conditions,

but whose suits nevertheless have been found to be subject to the PLRA.

2. The court below decided the issue contrary to clear statutory language and controlling precedent of this Court.

3. The disposition of the court below is in conflict with dispositions by other circuit courts of appeals.

SUMMARY OF ARGUMENT

The Prison Litigation Reform Act, PLRA, was not intended to be applied at all, and has not been applied, to actions by prisoners that do ***not*** involve prison conditions.

Suits by prisoners who sue to challenge the *fact* of their confinement, but who do not challenge the *conditions* of their confinement, are not subject to the PLRA.

Because the court below interpreted the PLRA and its attorneys' fees provision to encompass a prisoners' suit that did not challenge any prison condition, therefore, the court below erred as a matter of law.

The nub of the issue is whether the PLRA's attorneys' fees provision can be read in a vacuum and separately from the entire PLRA, so that the fact that 42 U.S.C. § 1997e(d) does not contain the words "prison conditions" trumps the pervasive use of the same words in numerous other parts of the statute, such as 42 U.S.C. § 1997e(a). Clearly, Congress never intended any section of the PLRA to govern any action that did not involve both a prisoner ***and*** a prison condition, nor has this Court ever interpreted the PLRA to apply to non-prison condition lawsuits.

ARGUMENT

Petitioners contend that the court below erred in applying the PRLA to a suit in which prison conditions were ***not*** in issue, but in which only the fact of confinement was in issue. Petitioners have been unable to find any case in which this Court or any other court has applied the PLRA when "prison conditions" were not in issue.

1. THE COURT BELOW ERRED BY APPLYING THE PLRA TO A CASE IN WHICH NO PRISON CONDITION WAS IN ISSUE.

The instant action clearly challenges the ***fact of*** and ***not any condition of*** confinement, PLRA's section 1997e(d) does not limit attorneys' fees in prisoner cases that have nothing to do with ***conditions of*** confinement, and the PLRA does ***not*** apply to an action simply or only because the plaintiff is a prisoner. But the court below held, erroneously, that section 1997e(d) applied to non-prison conditions lawsuits.

The disposition ignores entirely the statutory scheme of the PLRA. Instead it focuses on and incorrectly interprets several words contained within a subsection of one of the many statutes that comprise the PLRA's much broader statutory scheme. And, it ignores the basic principle of statutory construction, that instructs that statutes must be read as a whole. The interpretation of the court below would lead to unintended, absurd results, *viz.*: a prisoner suit against police who beat the prisoner during his arrest, and before his incarceration, would have fee limits imposed by the PLRA; a breach of contract action by a prisoner for acts alleged to have been committed before incarceration, similarly, would be subject to the PLRA; a

prisoner's suit for injuries sustained in an automobile accident before the time of incarceration would be subject to the PLRA. Absurd results evidence a parallactic error.

Despite the breadth of the PLRA, it does ***not*** apply even to all prisoner challenges to prison conditions. As even the court below has held, the PLRA limits attorneys' fees only "in ***certain*** actions brought by prisoners. . . . " *Armstrong v. Davis*, 318 F.3d 965, 970 (9th Cir. 2003) (emphasis added). For example, when prisoners succeed in challenging even prison conditions, when the conditions affect disabled prisoners, showing the conditions violate the Americans with Disabilities Act, 42 U.S.C. § 12205, and the Rehabilitation Act, 29 U.S.C. § 794, the PLRA, including its restrictions on recovery of attorneys' fees, is ***in***applicable. *Armstrong*, 318 F.3d at 970, 973-74. Such is the case here, and *Armstrong* and its reasoning should have been dispositive of this issue for the court below.

In *Thompson v. Gomez*, 993 F.Supp. 749, 754 (N.D. Cal. 1997), *rev'd on other grounds sub nom. Gilmore v. Peo. of the State of California*, 220 F.3d 987 (9th Cir. 2000), the court below found that "Congress stated its intention that federal courts should intrude into state prison conditions only where necessary to correct a federal right, and not to otherwise interfere with the state's operations of prisons. In *Gilmore*, the court below exhaustively reviewed the legislative history of the PLRA, including the congressional commentary, and found that the PLRA was enacted in response to "[l]itigation over prison conditions. . . . " 220 F.3d at 990-91 (emphasis added). As the court below itself explained in *Gilmore*, the PLRA was Congress' reaction to inmate lawsuits challenging "[f]irst, how warm the food is; second, how bright the lights are; third, whether there are electrical outlets in each cell; fourth, whether windows are

inspected and up to code; fifth, whether prisoners' hair is cut only by licensed barbers; and sixth . . . whether air and water temperatures are comfortable." *Id.* at 997 n.10. *See also Benjamin v. Fraser*, 343 F.3d 35, 41-42, 53-55 (2d Cir. 2003) (delineating application of PLRA to "prison conditions," including: "various environmental health and hygiene issues at the jails;" "(1) ventilation; (2) air temperature; (3) plumbing; (4) vermin; (5) food service; (6) personal hygiene; (7) sanitation in non-medical areas; (8) lighting in non-medical areas; (9) noise; (10) medical areas; and (11) modular units[;] * * * Bed-spacing requirement[;] . . . Operational windows[;] . . . Heating-system certification[;] . . . Lighting requirement[;] . . . Power washing [of showers] with bleach quaterly[;] . . . Scalding hot water . . . in showers and sinks[;] . . . Sanitation in food areas.")

Other statements in the congressional record reflect that the PLRA was Congress' reaction to inmate lawsuits challenging "insufficient storage locker space, a defective haircut by a prison barber, the failure of prison officials to invite a prisoner to a pizza party for a departing prison employee, and yes, being served chunky peanut butter instead of the creamy variety." *Nussle v. Willette*, 224 F.3d 95, 105 (2d Cir. 2000), *rev'd on other grounds sub nom. Porter v. Nussle*, 534 U.S. 516 (2002) (finding an isolated act of excessive force by a prison guard against a prisoner to be a "prison condition" within the PLRA).

The PLRA applies ***only to prisoner lawsuits challenging prison conditions***. Because the instant action is ***not*** a lawsuit challenging, much less having anything at all to do with, prison conditions, therefore, the PLRA has no application.

The district court correctly held that "[t]he PLRA does not apply to this action. The PLRA applies to any 'civil action with respect to prison conditions.' 18 U.S.C. § 3626(a)(1), (2). This phrase is defined in the PLRA as [para.] any civil proceeding . . . with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging ***the fact or duration of confinement in prison***. 18 U.S.C. § 3626(g)(2). [Therefore, t]he claims in this case do not involve constitutional violations arising from the conditions of confinement[;] [i]nstead, the plaintiffs contend that the Constitution is violated by a systemic policy of continuing to hold individuals in confinement after a judicial order of release." Order Granting Motion for Class Certification, Granting Motion for Preliminary Injunction, p. 15, n.5, November 7, 1998. (Emphasis added.) App. 41. In its fees order, the district court held that "as this Court held in its order granting the plaintiff's motion for preliminary injunction, '[t]he PLRA does not apply to this action.' (Order Granting Prelim. Injunc. at 15: n.5)." App. 41.

The district court got it right, but the court below did not.

"The Prison Litigation Reform Act of 1995, Pub. L. No. 104-34, 110 Stat. 1321-71 (PLRA) . . . addresses actions involving ***prison conditions***." *Johnson v. Jones*, 340 F.3d 625, 626 (8th Cir. 2003) (emphasis added). (This is only the most recent of a plethora of recent appellate dispositions as of this writing that stands for this basic, well-known proposition.) Numerous Ninth Circuit dispositions have applied the PLRA, but only to cases in which "conditions of confinement" were present. *See, e.g.*, *Wyatt v. Terhune*, 315 F.3d 1108, 1116 (9th Cir. 2003), *as amended on denial of*

rehearing, with suggestion for rehearing en banc (quoting "prison conditions" language of 42 U.S.C. § 1997e[a]); *Madrid v. Gomez*, 190 F.3d 990, 992, 993-94, 995 (9th Cir. 1999) (discussion of attorneys' fees in "class action challenging the conditions of confinement at Pelican Bay State Prison in California[;]" "PLRA . . . prohibits payment of fees that are not 'directly and reasonably' incurred in proving a violation of prisoners' rights[;]" quoting Supreme Court in *Lewis v. Casey*, 518 U.S. 343, 356 [1996]: "The Supreme Court has held that this right of access [to courts] requires prison authorities to provide prisoners with 'the capability of bringing contemplated challenges to ***SENTENCES OR CONDITIONS OF CONFINEMENT***. . . ." [Emphasis added.]). Thus, the court below recognizes the difference between prison lawsuits brought, on the one hand, to challenge the fact or duration of confinement, and, on the other hand, to challenge conditions of confinement. The former are subject to a potential *Heck v. Humphrey*, 512 U.S. 477 (1994), accrual-bar rule, but are not subject to the PLRA. Only the latter are subject to the PLRA. Because this case falls into the former category of prisoner cases, it is not subject to the PLRA. (Of course, that obviously is the reason that experienced defense counsel, who knew and understood this distinction, did not plead the PLRA as an affirmative defense in this action.)

The plethora of cases that address the PLRA, which became effective on April 26, 1996, deal with "limits on fees that may be awarded to attorneys who litigate prisoner lawsuits[,]" *Martin v. Hadix*, 527 U.S. 343, 347 (1999), in "disputes before [the Supreme Court that] arose out of . . . lawsuits challenging the ***conditions of confinement*** in the . . . prison [systems,]" (emphasis added);

"establish[ment of] standards for the entry and termination of prospective relief in civil actions challenging ***prison conditions***[,]" *Miller v. French*, 530 U.S. 327, 330, 333 (2000) (emphasis added); exhaustion of "'such administrative remedies as are available before suing over ***prison conditions***,'" *Booth v. Churner*, 206 F.3d 289 (2001) (quoting 42 U.S.C. § 1997e[a]; emphasis added); and which directly address and define "prison conditions[,]" *Porter v. Nussle*, 534 U.S. 516 (2002)[1]: "Congress described the cases covered by § 1997e(a)'s exhaustion requirement as 'action[s] . . . brought with respect to prison conditions.' Nussle's case requires us to determine what the § 1997e(a) term "prison conditions" means. *Id.* at 525. It means, following "precedent, the pathmarking opinion i[n] *McCarthy v. Bronson*, 500 U.S. 136 . . . (1991) . . . 'prisoner petitions challenging conditions of confinement.'" *Id.* at 526. "Prisoner petitions" fall into "two broad categories: . . . (1) those challenging the fact or duration of confinement itself; and (2) those challenging the conditions of confinement." *Id.* at 527 (quoting *McCarthy*, 534 U.S. at 140. Here, because plaintiffs' challenge was "***to the fact or***

[1] The prior case history of *Porter* is significant here. It is: *Beeson v. Fishkill Correct. Facility*, 28 F.Supp. 2d 884, 887 (S.D.N.Y. 1998), *overruled on other grounds*, *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *rev'd on other grounds*, *sub nom. Porter v. Nussle*, 534 U.S. 516 (2002). The importance of the prior history is that the case interpreted the PLRA with reference to the definition of "prison condition" and held, as plaintiffs argued herein, that 42 U.S.C. § 1997e must be read ***together*** with 18 U.S.C. § 3226(g)(2), which defines "the term 'civil action with respect to prison conditions,' stating: '[w]hen Congress, in one statute, uses the same words in two different places, those words should generally be read to mean the same thing in both places." The district court here so interpreted the relevant term. Order Granting Preliminary Injunction, n.5. App. 41.

duration of confinement itself," category (1), *supra*, and ***not*** a challenge to "***conditions of confinement***," category (2), *supra*, therefore, there is no appropriate application of the PLRA. (While failure to exhaust habeas relief, or *Heck v. Humphrey*'s peculiar accrual-bar rule, 512 U.S. 477 [1994], appropriately might be invoked to affect plaintiffs' case, because the fact or duration of confinement is in issue, nevertheless the PLRA may not be invoked.[2])

Just as "a Title VII claim against the prisoner's pre-incarceration employer, or, for that matter, a § 1983 claim against his arresting officer . . . fall outside § 1997e(a)[,]" *Porter*, 534 U.S. at 529 (ellipsised matter inverted), because "Congress inserted 'prison conditions' into the exhaustion provision simply to make [that] clear[,]" *ibid.*, so too does the instant action "fall outside" the PLRA because its does not involve "prison conditions" or "conditions of confinement," but rather involves the "fact or duration of confinement itself." This Court concluded *Porter* by holding that "the PLRA's exhaustion requirement applies to all inmate suits ***about prison life***, whether they involve general circumstances or particular episodes, and whether they allege excessive force or some other wrong[,]" *id.* at 532 (citation omitted; emphasis added), but the PLRA does not apply when prison conditions or conditions of

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[2] An action potentially barred by either a failure to have sought habeas relief or *Heck*, because it has to do with the fact or duration of confinement, such as the instant action, by necessary implication could ***not*** be subject to the provisions of the PLRA, because the predicates are mutually exclusive. Therefore, since the instant action categorically could be subject to a *Heck*-bar, therefore, it ***cannot*** be subject to the PLRA.

confinement, as here, are not involved. Thus, the court below erred on this issue.

It is noteworthy that the PLRA originally referred to "any action" by a prisoner brought pursuant to section 1983. *See, e.g., Baskerville v. Goord*, 1998 WL 778396 *7 (S.D.N.Y. 1998). Then Congress amended the PLRA to apply only to actions by prisoners "with respect to prison conditions." The court noted that "[w]hile several changes are apparent, the one of most significance to this action is that the PLRA ***reduced the scope of § 1997e(a) from 'any action' brought by an inmate to only those actions brought by an inmate 'with respect to prison conditions.'*** Clearly, actions 'with respect to prison conditions' are therefore a subset of all possible actions [brought by prisoners]." *Ibid.*

Here, this amendment is significant because "[w]hen Congress acts to amend a statute, [courts] presume it intends its amendments to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). Thus, in enacting the PLRA and limiting § 1997e(a)'s exhaustion requirement to actions brought "with respect to prison conditions," Congress must have meant to reduce the scope of § 1997e(a), otherwise the limiting language would not have any "real and substantial effect." Clearly, the PLRA does ***not*** apply to prisoner suits that do not address prison conditions, and the disposition of the court below to the contrary is in error.

Thus, since the PLRA does ***not*** apply to plaintiffs' suit and plaintiffs were found to be prevailing parties, because plaintiffs "cause[d] the defendant's behavior to change for the benefit of plaintiff[s,]" *Rhodes v. Stewart*, 488 U.S. 1, 4 (1988) (*per curiam*); *Hewitt v. Helms*, 482 U.S. 755, 761

(1987); *Richardson v. Continental Grain Co.*, 336 F.3d 1103, 1106 (9th Cir. 2003) (citing *Rhodes* and *Hewitt*), *see infra*, plaintiffs are entitled to an award of attorneys' fees, as awarded by the district court, pursuant to 42 U.S.C. § 1988(b).

2. THERE IS A CONFLICT AMONG THE CIRCUIT COURTS OF APPEALS ON THE ISSUE OF WHETHER THE PLRA APPLIES TO SUITS BY PRISONERS THAT DO NOT INVOLVE CONDITIONS OF CONFINEMENT.

The court below, the Ninth Circuit, has held that the PLRA applies to prisoner suits that do not involve conditions of confinement.

The Second and Eighth Circuits have held that the PLRA applies only to prisoner suits that involve conditions of confinement. *Benjamin v. Fraser*, 343 F.3d 35, 41-42, 53-55 (2d Cir. 2003); *Nussle v. Willette*, 224 F.3d 95 (2d Cir. 2000), *rev'd on other grounds sub nom. Porter v. Nussle*, 534 U.S. 516 (2002); and, *Johnson v. Jones*, 340 F.3d 625, 626 (8th Cir. 2003).

Because there is a conflict on this point among the circuit courts of appeals, certiorari should be granted.

CONCLUSION

The PLRA does not apply to non-prison conditions cases. It seriously was misconstrued by the court below, it does not apply at all to this action because the "fact and duration" of confinement, and not "conditions of confinement," was in issue.

Based on the foregoing, certiorari should be granted.

Respectfully submitted,

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December 4, 2003

APPENDIX A

77 Fed.Appx. 948

United States Court of Appeals,
Ninth Circuit.

R. VANKE, Plaintiff-Appellant,
v.
Sherman BLOCK; Los Angeles County Board of Supervisors; Lee Baca, Sheriff,
Defendants-Appellees.
R. Vanke, Plaintiff-Appellee,
v.
Lee Baca, Sheriff, in his official capacity only,
Defendant-Appellant.

Nos. 02-55600, 02-56472.

Argued and Submitted Sept. 11, 2003.
Decided Oct. 9, 2003.

Before: *KLEINFELD*, WARDLAW, and *W. FLETCHER*, Circuit Judges.

MEMORANDUM*

R. Vanke, on behalf of a class of similarly situated persons (collectively, "Vanke"), appeals the district court's grant of summary judgment in favor of defendants the former and current Los Angeles County Sheriffs and the County of Los Angeles (collectively, "Block"). Block cross-appeals the district court's award of attorneys' fees to

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* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by *Ninth Circuit Rule 36-3*.

Vanke. We have jurisdiction pursuant to 28 U.S.C. § 1291 and affirm the grant of summary judgment and reverse the award of attorneys' fees.[1]

The district court correctly ruled that Vanke's claim for injunctive relief is moot. "A case m[ay] become moot if subsequent events ma[ke] it absolutely clear that the allegedly wrongful behavior c[annot] reasonably be expected to recur." *United States v. Concentrated Phosphate Ass'n,* 393 U.S. 199, 203, 89 S.Ct. 361, 21 L.Ed.2d 344 (1968). According to the uncontroverted declaration of Charles M. Jackson, the Commander of the Correctional Services Division of the Los Angeles County Sheriff's Department, Block has adopted a new policy for processing court-ordered releases that complies with the terms of the preliminary injunction, and which goes even further toward promoting the prompt release of detainees. Such a conclusive change in policy, absent an indication that it was promulgated only in response to ongoing litigation, is sufficient to render a claim moot. *See White v. Lee*, 227 F.3d 1214 (9th Cir.2000).

Nor did the district court abuse its discretion in denying Vanke's Rule 56(f) motion. Vanke's attorneys did not diligently pursue their previously available discovery options, having conducted only two depositions in the three-year period during which the preliminary injunction was pending, one of which was terminated at Vanke's counsel's behest only twenty minutes after it commenced. *Panatronic USA v. AT & T Corp.*, 287 F.3d 840, 846 (9th

[1] Block's motion to strike Vanke's "third brief on the consolidated appeals" is DENIED.

Cir.2002) (no abuse of discretion unless the movant diligently pursued its previous discovery opportunities and shows how allowing discovery would have precluded summary judgment). Furthermore, Vanke's counsel failed to "proffer" facts to show that the information sought, "the names of persons (inmates) who were subjected to the unconstitutional policy in violation of the preliminary injunction," actually exists. *See Nidds v. Schindler Elevator Corp.*, 113 F.3d 912, 921 (9th Cir.1996) ("The burden is on the party seeking additional discovery to proffer sufficient facts to show that the evidence sought exits, and that it would prevent summary judgment"); *see also VISA Int'l Serv. Ass'n v. Bankcard Holders of Am.*, 784 F.2d 1472, 1475 (9th Cir.1986) (appropriate to deny a Rule 56(f) motion "where it was clear that the evidence sought was almost certainly nonexistent or was the object of pure speculation").

Although the district court correctly found that Vanke was the "prevailing party" under 42 U.S.C. § 1988(b), *Watson v. County of Riverside*, 300 F.3d 1092, 1096 (9th Cir.2002), it erred in awarding attorneys' fees because the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e, precludes such an award. PLRA section 1997e(d) requires that a "prisoner" plaintiff prove an "actual violation" of his rights to be entitled to fees. "Prisoner" is in turn defined as "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or diversionary program." 42 U.S.C. § 1997e(h). The definition of plaintiff's class, as certified by the district court in its order "Granting Motion for Class Certification," by its

plain language, brings the class within the PLRA definition of a prisoner. Because this case became moot before the plaintiff class had shown an actual violation of rights, section 1997e(d) precludes an award of attorneys' fees.

AFFIRMED in part/REVERSED in part. Each party shall bear its own costs on appeal.

APPENDIX B

United States District Court, C.D. California,
Western Division.

R. VANKE, et al., Plaintiff,
v.
Sherman BLOCK; et al., Defendants.

No. CIV.98-4111 DDP.

Aug. 8, 2002.

Stephen Yagman, Kathryn S. Bloomfield, Marion R. Yagman, Joseph Reichmann, Yagman & Yagman & Reichmann & Bloomfield, Venice Beach, CA, Richard H. Millard, Law Offices of Richard H. Millard, for plaintiffs.

Jeremy B. Warren, David Lawrence, Franscell, Strickland, Roberts & Lawrence, Glendale, CA for defendants.

ORDER GRANTING PLAINTIFFS' AWARD OF ATTORNEYS' FEES PURSUANT TO 42 U.S.C. § 1988

PREGERSON, District J.

This matter comes before the Court on the plaintiffs' motion for an award of attorneys' fees pursuant to 42 U.S.C. § 1988. After reviewing and considering the materials submitted by the parties, the Court adopts the following order.

I. Background

This equitable relief action was originally brought by a class of plaintiffs who contended that while they were pretrial detainees, they were "over-detained in the County Jail System so that there [could] be a check made on them for warrants, wants, and holds." (Verified First Amended

Complaint ¶ 17 ("FAC").) On November 7, 1998, the Court granted the plaintiffs' motion for class certification and issued a preliminary injunction enjoining various practices and policies of the Los Angeles County Sheriff's Department ("LASD"). Specifically, the Court ordered:

> that the defendants and their officers, agents, servants, employees, and all others in active concert of participation with them are enjoined during the pendency of this action from holding individuals who have been acquitted of the charges on which they are being held, or whose release has been ordered by a court, beyond the period of time that is required to perform the administrative steps incident to release, including a check for wants and holds known to the defendants at the conclusion of the administrative steps incident to the release, but not including additional time for the receipt or processing of wants and holds not known to the defendants at the conclusion of the administrative steps incident to release.

(Court's 11/7/98 Order at 45-46 (footnote omitted).)

On April 26, 2001, nearly 30 months after issuing the preliminary injunction, the Court denied the plaintiffs' motion to convert the preliminary injunction into a permanent injunction. The Court found that, absent a judgment on the merits, the plaintiffs were not entitled to permanent injunctive relief.

The plaintiffs then moved for summary judgment and a permanent injunction, while the defendant Sheriff Lee Baca (the "defendant") filed a cross-motion for summary judgment, arguing that the action was moot as a result of

the defendant's full compliance with the Court's preliminary injunction. The Court granted the defendant's motion, finding that the defendant had presented evidence that the County had instituted measures designed to ensure compliance with the preliminary injunction. Because the plaintiffs failed to come forward with any evidence to suggest that the defendant had failed to comply, or was likely to engage in further violations, the plaintiffs' motion for a permanent injunction was denied and the action was dismissed as moot.

Counsel for the plaintiffs now move for attorney fees' as a prevailing party under 42 U.S.C. § 1988. The defendants oppose this motion on the grounds that: (1) the plaintiffs cannot be considered prevailing parties in light of the recent Supreme Court decision in *Buckhannon*; (2) the plaintiffs' request for attorneys' fees is statutorily precluded by the Prison Litigation Reform Act ("PLRA"), 42 U.S.C. § 1997e; and (3) assuming, *arguendo,* that the plaintiffs are entitled to recover despite *Buckhannon* and the PLRA, their requested fees are unreasonable and should be reduced.

II. Legal Standard

1. *Attorneys Fees Under 42 U.S.C. § 1988*

The fee shifting provisions of § 1988(b) state: "[i]n any action or proceeding to enforce a provision of sections . . . 1983 . . . of this title [and other specified sections], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs . . . " 42 U.S.C. § 1988(b).

III. Discussion

In the recent case *Buckhannon Board & Care Home, Inc. v. W. Virginia Dept. of Health & Human Resources,* the Supreme Court interpreted the meaning of the term "prevailing party" and considered the character of judicial relief that a party must receive in order to recover attorney fees. 532 U.S. 598, 121 S.Ct. 1835, 149 L.Ed.2d 855 (2001). The defendants contend that because this Court denied the plaintiffs' request that the preliminary injunction be made permanent, and concurrently granted summary judgment to the defendants on the grounds that the action was moot, the plaintiffs cannot be considered a prevailing party under *Buckhannon.* The Court disagrees.

A. *Buckhannon's Treatment of Prevailing Parties and Its Application in the Ninth Circuit*

The plaintiff in *Buckhannon* was the operator of a nursing home that failed a West Virginia State Fire Marshall inspection for violating a state law requiring that all home residents be capable of "self preservation" (i.e. that they be able to remove themselves from dangerous situations such as fire). *Buckhannon,* 532 U.S. at 600. After receiving a cease and desist order requiring closure of the nursing home, the plaintiff brought suit seeking declaratory and injunctive relief on the grounds that the "self-preservation" requirement violated the Fair Housing Amendments Act of 1988, 42 U.S.C. § 3601 *et seq.* ("FHAA") and the Americans with Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq.* ("ADA"). *Id.* at 600-01. The respondents agreed to stay enforcement of the order pending resolution of the controversy, and after discovery had commenced, the state legislature enacted two bills eliminating the "self preservation" requirement. *Id.* at 601.

Since the allegedly offensive provisions were eliminated and there was no indication that the state legislature would repeal the amendments, the District Court granted the respondents cross-motion for summary judgment, finding that the the [sic] action was moot. *Id.* The plaintiffs then moved for attorneys' fees as the "prevailing party" under the FHAA and the ADA, arguing that they were entitled to recover under the "catalyst theory".[1]

In rejecting the catalyst theory, the Supreme Court stated that "enforceable judgments on the merits and court-ordered consent decrees create the material alteration of the legal relationship of the parties necessary to permit an award of attorney's fees." *Id.* at 604 (internal citations omitted). A judgement on the merits "provides the necessary foundation for a plaintiff's status as a prevailing party because the plaintiff has received at least some relief based on the merits of the claim" either in the trial court or on appeal. *Perez-Arrellano v. Smith,* 279 F.3d 791, 793 (9th Cir.2002) (*citing Buckhannon,* 532 U.S. at 604 (internal citations omitted)). A consent decree is acceptable, even without an admission of liability, "because it is a 'court-ordered chang[e] [in] the legal relationship' between the parties." *Id.* (*quoting Buckhannon,* 532 U.S. at 604).

The Supreme Court also expressed concern that the catalyst theory "allows an award where there is no

[1] The catalyst theory allows a plaintiff to recover as the prevailing party "if it achieves the desired result because the lawsuit brought about a voluntary change in the defendant's conduct." *Id.* at 601. Prior to *Buckhannon,* this approach was utilized by courts in the First, Second, Third, Sixth, Seventh, Ninth, Tenth and Eleventh Circuits. *Id.*

judicially sanctioned change in the legal relationship of the parties." *Buckhannon,* 532 U.S. at 605. Specifically, the Court noted that under the catalyst theory, a plaintiff could recover if it established that the complaint had enough merit to withstand dismissal for failure to state a claim or lack of jurisdiction. *Id.* In rejecting this potentiality, the Court held that "[a] defendant's voluntary change in conduct, although perhaps accomplishing what the plaintiff sought to achieve by the lawsuit, lacks the necessary judicial *imprimatur* on the change." *Id.* (emphasis in original). The Court clearly stated that a "non-judicial alteration of actual circumstances" has never been the basis for awarding attorney's fees under a prevailing party theory.[2] *Id.* at 606.

The Court also addressed concerns "that the catalyst theory is necessary to prevent defendants from unilaterally mooting an action before judgment in an effort to avoid an award of attorney's fees." *Id.* at 608. The Court was skeptical of these assertions in the absence of any empirical evidence. *Id.* However, the Court did acknowledge the "petitioner's fear of mischievous defendants" and noted that:

> [These concerns] only materialize in claims for equitable relief, for so long as the plaintiff has a cause of action for damages, a defendant's change in conduct will not moot the case. Even then, it is

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[2] In attacking the dissent, the majority opinion stated: "*We cannot agree that the term 'prevailing party' authorizes federal courts to award attorney's fees to a plaintiff who, by simply filing a nonfrivolous lawsuit (it will never be determined), has reached the 'sought after destination' without obtaining any judicial relief.*" *Id.* at 606 (internal citations omitted) (emphasis in original).

> not clear how often courts will find a case mooted: 'It is well settled that a defendant's voluntary cessation of a challenged practice does not deprive a federal court of its power to determine the legality of the practice' unless it is 'absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.'

Id. at 608-09 (*quoting Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 189, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000) (internal citations omitted)).

Lastly, the Court rejected the catalyst theory out of a concern that its application could "spawn a second litigation of significant dimension." *Id.* at 609 (internal citations omitted). This is because application of the catalyst theory would require a "highly factbound inquiry [into] the defendant's subjective motivations in changing its conduct." *Id.*

The Ninth Circuit has since ruled that although *Buckhannon* involved the fee-shifting provisions of the FHAA and ADA, "the Supreme Court's express rule of decision sweeps more broadly." *Perez-Arellano,* 279 F.3d at 794. The *Perez-Arellano* court noted that *Buckhannon* explicitly referred to "numerous federal statutes that allow attorney's fees and costs to the prevailing party," including 42 U.S.C. § 1988. *Id.* Thus, in *Perez-Arellano,* the court applied the *Buckhannon* rationale to the fee shifting provisions of the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A). Although the EAJA is not mentioned in *Buckhannon,* the Ninth Circuit could discern no

reason to interpret the "prevailing party" language of the EAJA inconsistently with *Buckhannon*.[3] *Id.* Therefore, this Court's analysis must comport with the Ninth Circuit's analysis of *Buckhannon.*

1. *The Defendants' Application of Buckhannon*

The defendants point to language from this Court's November 7, 2001 order granting summary judgment to the defendants, which states: "plaintiffs are not entitled to a permanent injunction because their motion for summary judgment was denied and they [have] therefore not succeeded on the merits of their claims." (Court's 11/7/01 Order.) The defendants cite precedent from the Fourth Circuit explaining that:

> [T]he fact that a preliminary injunction is granted in a given circumstance, then, by no means represents a determination that the claim in question will or ought to succeed ultimately; that determination is to be made upon the 'deliberate investigation' that follows the granting of the preliminary injunction.

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[3] Given the Ninth Circuit's recognition of the broad sweep of *Buckhannon,* and its finding that "[t]he Supreme Court did not expressly limit its interpretation of 'prevailing party' to the FHAA, ADA, and those statutes listed as examples of similar text," the Court rejects the plaintiffs' argument that discussion of § 1988 in *Buckhannon* is merely dicta. Moreover, the plaintiffs' reference to *Brickwood Contractors, Inc. v. United States,* 49 Fed. Cl. 738 (2001), as an example of how *Buckhannon* may be distinguished, is misplaced in light of the Ninth Circuit's direct rejection of *Brickwood. See Perez-Arellano,* 279 F.3d at 794, fn. 4 (rejecting *Brickwood*'s contention that *Buckhannon* is limited to the ADA and FDAA, as well as *Brickwood*'s consequent interpretation of the EAJA).

Smyth and Montgomery v. Rivero, 2002 U.S. App. LEXIS 2665 *1, *18-19 (4th Cir. 2002).

The defendants argue that because the preliminary injunction is not a binding adjudication on the merits, and given that the defendants prevailed at summary judgment on grounds of mootness, the plaintiffs cannot be "prevailing parties" who have secured a judgement on the merits under *Buckhannon.*

2. *The Proper Application of Buckhannon*

The defendants' argument belies the actual circumstances of this case and is inconsistent with the rationale of *Buckhannon.*

a. *Issuance of a Preliminary Injunction in this Case was Judicial Action that Materially Altered the Legal Relationship of the Parties*

In this case, the plaintiffs received relief from the Court which instituted a change in the legal relationship between the parties. When this action was originally filed, the plaintiffs sought injunctions requiring the LASD to: (1) alter its claims-settlement process (including waiver considerations); (2) regularly provide inmates with paperwork through which they could report alleged overdetention; and (3) refrain from delaying release of inmates against whom charges are dropped in court while checks were made to assure the absence of any other wants or holds against the inmate.

In opposition, the defendants filed a motion to dismiss the FAC. This motion to dismiss was denied in part and

granted to the extent the Court issued the preliminary junction previously described. (*See* Background, *supra* Sec. I.) In opposition to the instant motion for attorneys' fees, the defendants state:

> Rather than appeal this ruling or litigate the matter further, following the issuance of the preliminary injunction, a department-wide policy at the LASD was developed in order to *voluntarily comply* with the *preliminary injunction* and defendant has been in full compliance with the preliminary injunction since its issuance.

(Defs' Opp. at 1:22-26 (emphasis added).) The defendants further state that:

> Ultimately, based on the uncontroverted evidence proving compliance with the preliminary injunction and the clear indication that there was absolutely no intention of instituting any future policy or procedure that was prohibited by the preliminary injunction, judgement was granted in favor of the defendants.

(*Id.* at 3:14-16.) In light of these admissions, it is clear that the LASD did not voluntarily alter its behavior as a result of the plaintiffs bringing suit. Rather, the defendants changed their policies in order to comply with this Court's order.[4]

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[4] The plaintiffs waited more than two years before moving for summary judgment and requesting that the injunction be made permanent. At that point, the defendants produced evidence of changed policies which the plaintiffs failed to refute. Therefore, the Court granted summary judgment on the grounds that the action was moot.

In this case, the judicial *imprimatur* was stamped on an injunction that led to an alteration of actual circumstances. Here, the plaintiffs brought an action for equitable relief only. In response to the injunction, the LASD changed its conduct and mooted the case.[5] Because the defendants have admitted they changed course in order to comply with the injunction, there is no concern here of future "mini-litigations" designed to determine the defendants' subjective motivation. *Buckhannon* can be further distinguished because in this case the issue became moot in response to actions taken by the defendant itself, as opposed to a state legislature.[6]

Given the admitted compliance with the injunction, and the subsequent determination that the equitable action was moot on account of the defendants' compliance, the Court finds that the plaintiffs were prevailing parties who had secured a change in actual circumstances as a result of a judicial determination. This holding complies not only with the holding of *Buckhannon,* but also with principles of fundamental fairness.

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[5] Moreover, although courts may not often find a case mooted, the finding was appropriate here when there was no reasonable expectation that the LASD was likely to engage in further violations.

[6] Further, the Court notes that in Justice Scalia's concurring opinion he reasoned that the *Buckhannon* rule was consistent with *Talmage v. Monroe,* 119 P. 526 (1911). *Buckhannon,* 532 U.S. at 614 fn. 2 (Scalia, J., concurring). Justice Scalia explained that, in *Talmage,* costs were awarded after the defendant complied with an alternative writ of mandamus, where it was the writ, and not the mere petition, which led to the defendant's actions. Here too, the defendant acted to comply with the Court's Order and not because of the mere filing of an action.

3. *Effect of the PLRA*

The LASD contends that the PLRA applies to this action, and that plaintiffs should not be able to recover under the PLRA since there was never an "actual violation" of the plaintiffs' rights. Even if there was such an "actual violation", the LASD contends that the plaintiffs' fees should be reduced to comply with the provisions of the PLRA. These arguments are without merit. In this Court's previous Order granting the preliminary injunction and certifying the class, the Court held that "[t]he PLRA does not apply to this action." (Court's Order Granting Prelim. Injunc. at 15, fn.5.)

IV. Reasonableness of Requested Fees

Prior to analyzing the reasonableness of the requested fees, the Court first summarizes the plaintiffs' request:

286.25 hours @ $550.00=$157,437.50 (Stephen Yagman)
006.25 hours @ $400.00=$2,500.00 (Kathryn S. Bloomfield)
043.75 hours @ $350.00=$15,312.00 (Richard H. Millard)
[29.00 hours @ $550.00=$15,950.00 (Joseph Reichman)-NC]

Fee Total: $191,199.50, of which $175,249.50 is requested

With regard to costs, the plaintiffs request $1,653.00 ($150 filing fee, $696 in depositions, $45.50 in messengers, and $761.50 in photocopies (3,046 copies @ $0.25 per page)).[7]

[7] Yagman's resume speaks for itself. Kathryn Bloomfield is a partner in Yagman's firm, a lawyer for 15 years, holds a chemical engineering degree in addition to her JD, and has clerked for several magistrates. Richard Millard has practiced law since 1966, working as

(Continued on following page)

The filings drafted by Stephen Yagman ("Yagman") in this case are:

1) Complaint (5/24/98)
2) Motion for Class Certification (5/27-28/98)
3) Motion for Preliminary Injunction (5/30/98)
4) First Amended Complaint (7/1/98)
5) Reply to Opposition to Prelim. Injunc. (7/8/98)
6) Reply to Opposition to Class Certification (7/10/98)
7) Opposition to Motion to Dismiss (7/26/98)
8) 4 Mot.'s for Findings of Viol. of Prelim. Injunc. (3/23& 29/01)
9) Opp. to Def.'s Ex Parte Motion (6/21/01)
10) 10 Sets of Interrogatories (7/18/01)
11) Motion for Summary Judgment (8/16/01)
12) Reply to Pl.'s Opp. to Summary Judgment (9/01/01)
13) Reply to Pl.'s Objections to Evidence for MSJ (09/11/01)
14) Reply to Opp.'s Sanctions Motion (9/14/01)-(no charge)
15) Reply to Opp.'s Motion to Strike (9/16/01)
16) Opp. to Def.'s Cross-Motion for Summary Judgment (10/15/01)

In addition to time spent drafting pleadings, most of Yagman's other hours were spent reading pleadings, making telephone calls, having discussions with co-counsel, taking depositions and reviewing deposition testimony, and drafting various office memos and letters.

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a public defender for most of that time until leaving for private practice in 1989. Over the last 8 years, he has been co-counsel with Yagman on approximately 20 cases, in addition to working on various civil rights and capital cases.

Richard Millard's 43.75 hours were spent interviewing clients, making telephone calls, studying the various motions and orders, and conferencing with co-counsel.

Kathryn Bloomfield billed 6.25 hours for researching and preparing memoranda, and attending a hearing.

In addition, Yagman provides receipts for three depositions, as well as a messenger service receipt.

A. *Legal Standard*

To determine the amount of an award of attorney's fees, the court must first calculate the "lodestar amount" by multiplying the number of hours reasonably spent on the litigation by the reasonable hourly billing rate.[8] *Long v. United States Internal Revenue Service,* 932 F.2d 1309 (9th Cir.1991). A prevailing plaintiff must submit to the court documentation of the hours expended in the case and the hourly fees claimed. "If these two figures are reasonable, there is a 'strong presumption' that their product, the lodestar figure, represents a reasonable award." *Jordan v. Multnomah County,* 815 F.2d 1258 (9th Cir.1987) (*quoting Pennsylvania v. Delaware Valley Citizens' Council for Clean Air,* 478 U.S. 546, 106 S.Ct. 3088, 92 L.Ed.2d 439 (1986)).

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[8] The LASD contends that the PLRA applies to this action, and that, as such, the award of attorney's fees under the statute is limited to a maximum hourly rate of 150% of the rate paid to court appointed counsel under 18 U.S.C. § 3006A. (Opp. at 10:22-28.) However, as this Court held in its order granting the plaintiff's motion for preliminary injunction, "[t]he PLRA does not apply to this action." (Order Granting Prelim. Injunc. at 15:fn.5.)

In determining the reasonableness of the hours billed the court will also examine whether the time spent is compensable, what hourly rates should be applied, and whether the hours should be reduced because of excessive time spent on a particular activity. *Nat'l Ass'n of Concerned Veterans v. Sec. of Def.*, 675 F.2d 1319, 1327-1328 (D.C.Cir.1982). Additionally, the court may reduce the amount of an award of attorney's fees if the hours billed are (1) duplicative, *Carter v. Sedgwick County*, 36 F.3d 952 (10th Cir.1998), *cert denied*, (2) not allotted to specific tasks, *Case v. Unif. Sch. Dist. No. 233, Johnson City*, 157 F.3d 1243 (10th Cir.1998), or (3) if the plaintiff obtains only partial or limited success. *Hensley v. Eckerhart*, 461 U.S. 424, 436-37, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983).[9]

B. *Summary of Plaintiff's Fee Requests*

As detailed supra, the plaintiffs are entitled to an award of attorneys' fees under Section 1988. The plaintiffs' counsel have submitted documentation regarding the number of hours expended on this matter since it began in 1998. The Fee Summaries document that Stephen Yagman, who served as lead counsel in this matter, expended 286.25 hours on this matter and Kathryn S. Bloomfield

[9] The defendants contend that this Court should also consider (1) the novelty and complexity of the disputed issues, (2) the special skill and experience of counsel, (3) the quality of the representation, and (4) the results obtained, in determining the reasonableness of the requested hours expended. *Blum v. Stevenson*, 465 U.S. 886, 898-900, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). However, when the court in *Blum* considered these factors, it did so in order to determine the "appropriateness of the upward adjustment of the fee award," and not the reasonableness of the hours reported. *Id.*

and Richard R. Millard spent 6.25 and 43.75 hours respectively. The plaintiffs do not seek fees for Joseph Reichman's work on the matter, which totaled 29 hours at an hourly rate of $550.00. In sum, the plaintiffs seek an award of attorneys' fees in the amount of $182,537.00.[10]

Plaintiffs' counsel indicate the present hourly rate for Stephen Yagman is $550.00 and Kathryn S. Bloomfield's and Richard R. Millard's hourly rates are $400.00 and $350.00 respectively. While the plaintiff's attorneys billed hours in years where they charged lower hourly rates, it is appropriate to apply current hourly rates rather than historic rates in reaching an award of attorney's fees. *Missouri v. Jenkins by Agyei,* 491 U.S. 274, 109 S.Ct. 2463, 105 L.Ed.2d 229 (1989). The billing rate used by the district court in arriving at its lodestar figure should be established by reference to the fees that private attorneys of an ability and reputation comparable to that of prevailing counsel charge their paying clients for legal work of similar complexity. *Davis v. City of San Francisco,* 976 F.2d 1536, 1542 (9th Cir.1992).

The Court finds that the hourly rates are excessive. Based on the Court's own experience in considering fee

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[10] The plaintiffs' motion for an award of attorney's fees requested an award of $175,249.50. This figure has been adjusted to include fees totaling $7,287.50 for Yagman's work on the plaintiffs' reply to the defendant's opposition to the fee application. Yagman billed 13.25 hours at $550.00/hour, for reading and analyzing the defendant's opposition to the plaintiffs' fees motion, additional research, and writing the plaintiffs' reply to the defendant's opposition to the motion for attorney's fees. (Reply at 8:9-17.) The Court finds that the amount of time spent by Yagman responding to the defendant's opposition to the fee application was reasonable.

requests by other counsel, and given the lack of contemporary evidence submitted by the plaintiff to demonstrate the reasonableness of the claimed rates, the Court finds it appropriate to reduce the rates as follows: the hourly rate for Stephen Yagman for this case is $400.00, and Kathryn S. Bloomfield's and Richard R. Millard's hourly rates are $300.00 and $250.00 respectively.[11] Specifically, Yagman has not submitted any evidence that he was awarded a fee in excess of this adjusted rate for any similar case. Other cases where the plaintiff's counsel was awarded an hourly rate of $450 are distinguishable from the instant case because, in those cases, the court specifically found that the complexity of the issues merited such an award. In this case, the Court does not find that the complexity of the issues merit a rate at the highest end of the spectrum, as Yagman requests.

1. *Fees Relating to Unsuccessful Claims*

While a court may reduce the fee award in cases where the plaintiff only received partial or limited success, *Hensley,* 461 U.S. at 436-37, such a reduction is not warranted in this case. As the Ninth Circuit held in *Cabrales*

[11] The Court notes that the plaintiff's evidence also does not support a fee award for an hourly rate of $550 in part because most of the plaintiffs' supporting evidence is out-of-date. The Blecher declaration states that Mr. Blecher bills at a maximum of $450 per hour, although this declaration is dated 1996. (Blecher Decl. ¶ 3.) The chart detailing the highest hourly rates at law firms reflects a maximum hourly rate of $400, although it appears to reflect 1988 figures. Out of the evidence that addresses billing rates for the more recent past, there is minimal support for the requested rate. For example, the O'Neill declaration executed in 2002 suggests only that a billing range between $400 and $600 is appropriate. (O'Neill Decl. ¶ 4.)

v. County of Los Angeles, "[a] plaintiff who is unsuccessful at a stage of litigation that was a necessary step to her ultimate victory is entitled to attorney's fees even for the unsuccessful stage." 935 F.2d 1050, 1052 (9th Cir.1991).

The defendants claim that because judgment was ultimately entered in favor of the defendants, a substantial amount of the hours claimed by the plaintiffs are unreasonable.[12] Specifically, the defendants claim that the defendants "should not have to pay for plaintiff's counsel's choice to spend inordinate amounts of time on frivolous matters following April 24, 2001." (Defs' Opp. at 19:4-5.) The defendants appear to contend that the April 26, 2001 Order was dispositive on the issue of whether a permanent injunction would be issued. This is not the case. The Order reads:

> The plaintiffs must succeed on the merits of their claims to be entitled to a permanent injunction. Here, the plaintiffs have not succeeded *on the merits* of their claims through a motion for summary judgment or trial, and therefore are not entitled to summary judgment.

(Court's April 26, 2001 Order) (citations omitted) (emphasis added).

Accordingly, the plaintiffs filed a motion for summary judgment. The Court does not find that the hours spent by the plaintiffs' counsel following the April 26, 2001 order

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[12] The defendant's argument that the amount of the plaintiffs' fee award should be reduced because some of the plaintiff's claims were dismissed on the defendant's motion to dismiss fails for the reasons discussed above.

were "frivolous." Therefore, the Court finds that the hours billed after April 2001 should not be reduced solely because the Court ultimately denied the plaintiffs' motion for a permanent injunction.

2. *Specificity of Descriptions for Hours Billed*

The defendants claim that, as in *Case,* the plaintiffs' accounting for hours marked as "conference" do not meet the plaintiffs' burden of showing that the billed hours were allotted to specific tasks. *Case,* 157 F.3d at 1253. In *Case,* the court found reductions appropriate for time spent in "conference" because the billing entries did not show how much time was spent in or what happened at conference. *Id.* Discussing the specificity which billing hours must meet, the Supreme Court stated, "counsel, of course, is not required to record in great detail how each minute of time was expended. But, at least counsel should identify the general matter of his time expenditures." *Brady v. Fort Bend County,* 145 F.3d 691, 716 (5th Cir.1998) (citing *Hensley v. Eckerhart,* 461 U.S. 424, 437 n. 12, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983)).

Yagman rendered services on March 22, 2001 which are described solely as "telephone" and "memo to file," and which record the time spent at one hour. (Pls' Decl. in Support of Mot. for Attys' Fees at 1, hereinafter "Pls' Decl".) Except for the March 22, 2001 entry, all of Yagman's entries for "telephone" either list the person with whom he spoke, or the entries are bundled with other tasks. Richard H. Millard's fee summary contains a total of 4.55 billed hours described only as "Telephone call(s)". (Pls' Decl., Ex. A.) As in *Case,* the Court finds that hours billed only as "telephone" or "telephone call(s)" do not meet the

requirement that billed hours be allotted to specific tasks. *Hensley,* 461 U.S. at 437 n. 12. (finding that "at least counsel should identify the general matter of his time expenditures.")

Therefore, the Court reduces the plaintiffs' fee award by a total of $1537.50 for failing to present with sufficient specificity the tasks undertaken by Millard for a total of 4.55 hours and by Yagman for a total of one hour.

3. *Excessive and Duplicative Fees*

When more then one attorney works on a case or one aspect of a case, the court may reduce the number of hours billed as duplicative. *LaPrade v. Kidder, Peabody & Co.,* 146 F.3d 899 (D.C.Cir.1998) (ten percent reduction in attorney's fees when six partners and seven associates worked on case). It is within a court's discretion to reduce "the proposed lodestar by a reasonable amount without performing an item-by-item accounting." *Id.*

In this case, there is some overlap in the work performed by Yagman and Millard. As an example of such overlap, the defendants point to the fact that Yagman spent 7.75 hours reading the objections to the original motions for preliminary injunction and class certification, and Millard billed 0.5 hours for conducting the same task.[13] Another example cited by the defendants is that Yagman spent five hours studying Sheriff Sherman Block's

[13] Millard's June 12, 1998 entry also includes "Rec'd Ct. order changing date of 6/15 to 6/29 in ctrm. 3." (Pls' Decl., Ex. A.)

deposition and Millard spent 4.75 on the same task.[14] Where both Yagman and Millard have billed for the same task, the total accounting for these hours is as follows: Yagman spent 38.25 hours and Millard spent 11 hours on the same tasks. The Court finds that duplicative billing for these matters is inappropriate and therefore denies fees for the eleven hours that Millard billed for tasks that were also performed by Yagman. *Ramos v. Lamm,* 713 F.2d 546, 554 (9th Cir. 1983).

The defendants also claim that Yagman overstated his billable hours because on five different days, he expended over eight hours on this matter. While ten and fourteen hour days are extraordinary, the Court finds that Yagman's Fee Summary is reasonable in light of the case matter and length. The Court therefore finds that no reduction of the plaintiffs' fee award is warranted on this basis because the hours billed are not necessarily excessive nor duplicative.

4. *Allowable Costs*

Federal Rule of Civil Procedure 54(d)(1) provides generally that "costs other than attorney's fees shall be allowed as of course to the prevailing party unless the court otherwise directs." Fed. R. Civ. P. 54(d)(1). An award

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[14] The defense fails to note that Millard recorded the time he spent studying Block's deposition with other services, such as: reviewing the file, studying court rulings in related overdetention cases, and a telephone call. (Pls' Decl. Ex. A.)

The Court finds the amount of time billed for reading the deposition to be excessive and therefore reduces the amount of time for which Yagman may be reimbursed for this task to two hours.

of costs under Section 1988 may only include costs that would "ordinarily be treated as reimbursable in a private attorney-client relationship." *Davis v. City and County of San Francisco,* 976 F.2d 1536, 1557 (9th Cir.1992). The plaintiffs' attorneys claim costs totaling $1,653.00.[15] The Court finds that the costs incurred by the plaintiffs are fully compensable under Section 1988 and therefore awards $1,653.00 in costs to the plaintiffs.

IV. Conclusion

For the foregoing reasons, the Court awards the plaintiffs attorneys' fees in the amount of $128,325 and costs totaling $1,653.00.[16]

IT IS SO ORDERED.

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[15] Costs are claimed as follows: filing fee costs of $150.00; deposition costs of $696.00; messenger costs of $45.50; and photocopying costs of $761.50.

[16] The Court calculated the attorneys' fee award in this case as follows: 298.5 hours for Yagman (286.25 hours plus 13.25 hours minus one hour) at an hourly rate of $400, 28.2 hours for Millard at an hourly rate of $250, and 6.25 hours for Bloomfield at an hourly rate of $300.

APPENDIX C

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

R. VANKE, et al., Plaintiffs, v. SHERMAN BLOCK, et al. Defendants.	Case No. CV 98-4111 DDP (SHx) ORDER GRANTING MOTION FOR CLASS CERTIFICATION, GRANTING MOTION FOR PRELIMINARY INJUNCTION, DENYING IN PART AND GRANTING IN PART MOTION TO DISMISS. (Filed Nov. 7, 1998)

This matter comes before the Court on the plaintiffs' motions for class certification and preliminary injunction, and on the motion of defendant Sheriff Sherman Block (the "Sheriff") to dismiss the action for failure to state a claim upon which relief can be granted. The plaintiffs contend that the Los Angeles County Sheriff's Department (the "Department") maintains an unconstitutional policy of continuing to hold pretrial detainees who are entitled to be released after acquittal or dismissal of the charges against them in order to check for warrants,[1] wants and holds.[2]

[1] The complaint alleges that the Department checks for warrants. The Sheriff contends that the Department does not check for warrants, but only for wants and holds. (Walker Decl. ¶ 5.)

[2] Wants and holds are the means by which one law enforcement agency notifies another agency that the notifying agency has authority to detain an individual currently in the custody of the notified agency.

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The Sheriff[3] contends that such record checks are not constitutional violations, but rather are necessary steps in the administrative process of releasing pretrial detainees.

Having considered the contentions of the parties in light of the applicable legal authorities, the Court rules as follows:

The motion for class certification is granted. The Court finds that three of the named plaintiffs meet the constitutional standing requirements, and that three of the named plaintiffs meet the requirements set forth in Rule 23 of the Federal Rules of Civil Procedure.

The motion for preliminary injunction is granted. The Court makes a preliminary finding of fact that the Department maintains and implements a policy under which court-ordered releases are not carried out until the Department has taken up to thirty-six hours to update its computer database to reflect wants and holds that arrived on the day of the order. The Court analyzes the constitutional claims by separating release delays into two categories based on the government conduct causing the delay: (1) delays caused by the administrative steps incident to

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See, e.g., Cal. Code Regs. tit. 15 §§ 2000(b)(52), 2600, 5331, 5332, 5334 (authorizing parole agents and the California Board of Prison terms to issue wants and holds for detained individuals upon reasonable suspicion of parole violation); 8 U.S.C.A. § 1226(d) (West Supp. 1998) (requiring Attorney General to devise and implement a system to assist state law enforcement agencies in identifying aliens unlawfully present in the United States pending criminal prosecutions).

[3] Among the two defendants remaining in the action, the Sheriff and the County of Los Angeles (the "County"), only the Sheriff has responded to the complaint and filed oppositions to the present motions.

release ("administrative delays"), and (2) delays caused by the policy of deferring the commencement of those steps until the Department has updated its database of wants and holds ("investigative delays"). Administrative delays are governed by the due process clause of the Fourteenth Amendment. They violate due process if the delay is the result of arbitrary or deliberately indifferent government conduct that shocks the conscience. Investigative delays constitute a reseizure and are governed by the Fourth Amendment. Absent probable cause or reasonable suspicion to believe that unprocessed wants and holds include a want or hold against a particular individual whose release has been ordered, continued detention of that individual longer than required to perform the administrative steps incident to release violates the Fourth Amendment guarantee against unreasonable seizure.

The Department acknowledges that it has no reason to believe that a want or hold is more likely to arrive on the day that an individual is ordered released than on any other day during or after the individual's period of lawful custody. The speculation that a want or hold may appear, absent any particularized reason to expect its appearance for a given individual, does not provide a lawful basis to detain that individual under the Fourth Amendment. Therefore, the Department policy of continuing to detain individuals for up to two days on the mere possibility that a want or hold will appear creates an actual and imminent threat to the Fourth Amendment rights of the named plaintiffs and the class of detainees whom they represent. Because the harm created by unlawful seizure is irreparable, injunctive relief is appropriate and required.

The Court concludes that the first amended complaint states a claim under § 1983 based on the over-detention

policy. The Court concludes, however, that the first amended complaint fails to state a claim based on the Department's policy of approaching over-detained individuals with settlement offers. The motion to dismiss is therefore granted in part and denied in part.

I. BACKGROUND

A. Parties, Claims & Remedies

The first amended complaint ("FAC"), filed July 1, 1998, alleges that plaintiff Vanke is a pretrial detainee currently in the Sheriff's custody. (FAC ¶ 10.) The FAC alleges that Vanke "previously was over-detained [because of] a check for warrants, wants and holds and presently believes he again will be over-detained for the same reason. . . ." (*Id.*)

Named plaintiffs E. Villafranco, R. Angulo, and V. Halajian are also alleged to be pretrial detainees. (*Id.* ¶ 16.) There are no allegations, however, that Villafranco, Angulo or Halajian were over-detained in the past.

The action is brought on behalf of a purported class of persons who "(1) are charged with crimes, (2) held in County custody, (3) whose charges are dismissed, and (4) who at that moment have an immediate and unconditional right to be released from custody." (*Id.*) The class is alleged to include approximately 22,000 detainees. (*Id.* ¶ 18.)

The defendants are the Sheriff and the County. The original complaint and the FAC also named seven members of the Los Angeles County Board of Supervisors, alleging that they caused over-detentions by voting to indemnify county employees for punitive damage awards.

The plaintiffs voluntarily dismissed the action against the county supervisor defendants on the same day that the FAC was filed. (*See* Stipulation and Order For Dismissal Without Prejudice, filed July 1, 1998.)

The FAC alleges that the defendants violate detainees' Fourth Amendment right to be free from unreasonable seizure and their Fourteenth Amendment right to due process by continuing their detention, after an order of release, to check for warrants, wants and holds.

The FAC seeks the following relief: (1) a declaration that continued detention to check for warrants, wants and holds is unconstitutional; (2) an injunction prohibiting (a) the practice of retaining detainees whose charges have been dismissed in order to check for warrants, wants and holds, and (b) the practice of approaching detainees who have been over-detained in order to offer "to pay them relatively insubstantial sums of money in return for waivers of a right to sue;" (3) an injunction mandating the establishment of a mechanism to advise pretrial detainees of their right not to sign waivers of liability, and mandating that all such waivers be unilaterally revocable for 30 days; (4) an injunction mandating that the defendants circulate over-detention claim forms to all detainees every five days, and requiring copies of any completed forms to be filed with this Court, and served on the class counsel. (FAC ¶ 9; Mot'n at 6-7 (providing details of the claim form process).)

II. MOTION FOR CLASS CERTIFICATION

A. Legal Standard

The party seeking class certification bears the burden of proving that certification is appropriate. *See Doninger v.*

Pacific Northwest Bell, Inc., 564 F.2d 1304, 1308 (9th Cir. 1977).

In considering a motion for class certification, the Court does not consider the merits of the moving party's claims. *See Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.").

The Court may consider the allegations of the complaint in determining whether the Rule 23 requirements are met. *See* Schwarzer et al., *Federal Civil Procedure Before Trial* § 10:574 (Rutter 1998). In addition, the Court may consider extrinsic evidence, and may request the parties to supplement the allegations of the complaint with sufficient evidence to allow informed judgment as to each of Rule 23's requirements. *See id.* § 10:575.

The plaintiffs have moved for certification under Rule 23(b)(2), which provides that a class action is maintainable if "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2).

In order to maintain a class action, a party must first meet the following prerequisites listed in Rule 23(a):

> Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions

> of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interest of the class.

Fed. R. Civ. P. 23(a).

B. Standing

As a threshold matter, before applying the Rule 23 factors, the Court is required to determine whether the named plaintiffs have Article III standing as individuals. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Allee v. Medrano*, 416 U.S. 802 (1974).

Class representatives must have standing at the commencement of the action, although the action on behalf of the class may continue if the representatives' claims become moot during the action. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 52-53 (1991); *Lee v. State of Oregon*, 107 F.3d 1382, 1390 (9th Cir. 1997). In cases alleging certain types of transitory harm, the class representatives' standing need not exist at the time of certification, provided that it existed at the time the action was filed. "'[S]ome claims are so inherently transitory that the trial court will not have even enough time to rule on a motion for class certification before the proposed representative's individual interest expires.'" *McLaughlin*, 500 U.S. at 52 (quoting *United States Parole Comm'n v. Geraghty*, 445 U.S. 388, 399 (1980)); *Gerstein v. Pugh*, 420 U.S. 103, 110 (1975).

Under Article III of the Constitution, "the irreducible constitutional minimum of standing contains three elements." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560

(1992). The plaintiffs have the burden to allege[4] facts supporting three elements: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) a likelihood that the injury will be redressed by a favorable decision. *See Lujan*, 504 U.S. at 560-61.

In addition, standing to seek injunctive relief under § 1983 must be analyzed separately from standing to seek retrospective relief. *See City of Los Angeles v. Lyons*, 461 U.S. 95 (1983). *Lyons* holds that a federal court plaintiff does not have standing to obtain an injunction unless the plaintiff shows a real or immediate threat that the plaintiff will be wronged again. *Id.* at 105. A conjectural or hypothetical threat of future injury is insufficient. *See id.* at 105-10.

The threat that these plaintiffs will be detained for a want and hold check is sufficiently certain under the rule of *Lyons*. The plaintiff in *Lyons* could not allege with any degree of certainty that he would ever by stopped by the police again, and if stopped, subjected to a chokehold. *Id.* Unlike the plaintiff in *Lyons*, these plaintiffs are already in the defendants' custody. Their custody is certain to end either in release or remand to another law enforcement agency. The application of the allegedly unconstitutional policies to these plaintiffs is contingent on one event – a

[4] At the pleading stage, the plaintiff's burden is discharged by "general factual allegations" to support each element. *Lujan*, 504 U.S. at 561. Standing may be challenged at any stage of the litigation, however. At summary judgment the plaintiff would have to set forth facts demonstrating a genuine question; at trial, the facts demonstrating standing must be "supported adequately by the evidence." *Id.*

release order – not on a speculative chain of events. *See Thomas v. County of Los Angeles*, 978 F.2d 504, 507-08 (9th Cir. 1992) (holding that plaintiffs demonstrated a realistic threat from future application of persistent practice of police misconduct within a small neighborhood); *Gonzales v. City of Peoria*, 722 F.2d 468, 481 (9th Cir. 1983) (holding that where plaintiffs alleged that police consistently applied city policy of checking immigration status of motorists who appeared to be of Mexican descent, contingent nature of future traffic stop did not defeat standing).

The threatened injury – detention after a judicial release order – will be directly caused by the defendants' policy to delay release for a want and hold check, and would be redressable by an injunction against the policy. On the causation and redressability prong, however, the situation of named plaintiffs Villafranco, Angulo, and Halajian diverges from that of named plaintiff Vanke. The Department currently has information that Vanke is subject to a hold. (*See* Santos Decl., Ex. A. to Opp'n, ¶ 2.) Detention of Vanke after a judicial release order would thus not be caused by the defendants' policy of imposing detention to perform a check; the check has already been performed. Vanke's continued detention, therefore, would neither be caused by the current checking policy; nor would it be redressable by an injunction against the policy.

While Vanke's parole violation makes his standing questionable, this lawsuit may go forward based on the standing of named plaintiffs Villafranco, Angulo, and Halajian. The presence of one named plaintiff with standing is sufficient to invoke federal court jurisdiction under Article III without considering the standing of other named plaintiffs. *See Watt v. Energy Action Educ. Found.*,

454 U.S. 151, 160 (1981); *California ex rel. State Water Resources Control Bd. v. F.E.R.C.*, 966 F.2d 1541, 1561 (9th Cir. 1992); *Comer v. Cisneros*, 37 F.3d 775, 788 (2d Cir. 1994); 13A Charles A. Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 3531.15, at 101 (1984).

The Court understands the Sheriff's contention that Villafranco, Angulo, and Halajian might also be subject to holds. The Court construes the allegation of the FAC that these plaintiffs are entitled to immediate release upon dismissal of their current charges to include an allegation on information and belief that a check for wants and holds would reveal no authority to hold them. (FAC ¶ 16.) At this stage of the litigation, with the want and hold information in the defendants' control, this allegation is sufficient to establish the standing of Villafranco, Angulo, and Halajian.

The present detention of the named plaintiffs distinguishes this case from *O'Shea*, 414 U.S. 488, *Lee*, 107 F.3d 1382, *Eggar v. City of Livingston*, 40 F.3d 312 (9th Cir. 1994), and *Nelsen v. King County*, 895 F.2d 1248 (9th Cir. 1990). In these cases, the plaintiffs were safe from application of the allegedly unconstitutional practices unless a long chain of speculative events, some of which were contingent on the plaintiffs' voluntary choices, converged to bring the plaintiffs within the defendants' control, or within a class of people likely to be harmed by the defendants' practices. *See O'Shea*, 414 U.S. at 496 (holding that plaintiffs did not have standing because prospect of future injury depended on likelihood that they would commit a crime and be arrested); *Eggar*, 40 F.3d at 316 (holding that standing did not exist where plaintiffs would have to commit a crime, be arrested, plead guilty, and be

sentenced to jail in order to be subject to challenged practice); *Nelsen*, 895 F.2d at 1254 (finding only speculative possibility that plaintiffs would suffer relapse into serious alcohol dependency requiring residential treatment, and leading to treatment in same facility where previously treated); *Lee*, 107 F.3d at 1387-90 (finding only speculative possibility that terminally ill plaintiff would become depressed, explore assisted suicide option, and be unduly pressured to choose it).

In light of the foregoing, the Court concludes that three of the named plaintiffs have established Article III standing.

C. Rule 23 Requirements

1. Prerequisites for Class Action Under Rule 23(a): Numerosity, Commonality, Typicality, and Adequacy of Representation

a. Rules 23(a)(1) and (2): Numerosity and Commonality

The Sheriff does not contest the plaintiffs' showing that the approximately 20,000 to 22,000 detainees in County custody constitute a group too numerous for practicable joinder, or that there are questions of law and fact common to the class under Rules 23(a)(1) and (2). The Court concludes that the prerequisites of Rules 23(a) and (2) are met.

b. Rule 23(a)(3): Typicality

Typicality under Rule 23(a)(3) is shown when "a plaintiff's injury arises from or is directly related to a

wrong to a class, and that wrong includes the wrong to the plaintiff." 1 Herbert B. Newberg & Alba Conte, *Newberg on Class Actions* § 3.13, at 3-72 (3d ed. 1992). In making this determination, the Court looks to the elements that the named plaintiffs must prove to prevail on the cause of action. If the elements that the class representative must prove are substantially the same as the rest of the class, typicality is generally met. *See id.* § 3.15 at 3-82. The purpose of the typicality requirement is to ensure that the interests of the named representative aligns with the interests of the class. *See Hanon v. Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992).

The Sheriff contends that because detainees are not entitled to instantaneous release, but only reasonable release in light of all of the circumstances, proof of liability for over-detention will require an individualized inquiry for each class member. This contention, however, does not defeat typicality. The individualized inquiry does not require the named plaintiffs to prove different elements. The contention that some class members' detentions after dismissal will be reasonable while those of other members will not be reasonable does not change the fact that liability for each class member turns on the same element, reasonableness. *See Hanon*, 976 F.2d at 508 ("Typicality refers to the nature of the claim or defense of the class representative, and not to the specific facts from which it arose or the relief sought.").

The Court finds that the Rule 23(a)(3) typicality requirement is met.

c. Rule 23(a)(4): Adequacy of Representation

The Ninth Circuit has recognized two criteria for determining the adequacy of class representation. *See Lerwill v. Inflight Motion Pictures, Inc.*, 582 F.2d 507, 512 (9th Cir. 1978). First, the representative must be able to prosecute the action vigorously through qualified counsel. *See id.* Second, the representative must not have interests that are antagonistic to the interest of the class. *See id.*

The standard for qualifications and competency of class counsel looks to the attorney's experience, resources, ability, ethics, and any potential conflicts of interest. Class counsel has met these requirements.

The Court finds no evidence that the named plaintiffs have interests antagonistic to the rest of the class members.

In light of the foregoing, the Court finds that the requirements of Rule 23(a)(4) are met.

2. Grounds for Class Action Under Rule 23(b)(2)

The Sheriff does not dispute that by keeping released detainees in detention to check for wants and holds, the defendants have acted or refused to act on grounds generally applicable to the class. The Court finds that the plaintiffs have presented evidence indicating that the department maintains a policy of continuing detentions beyond the time of acquittal or dismissal to check for wants and holds. (*See* Block Depo. at 33.) This policy is generally applicable to members of the class which the plaintiffs seek to certify.

D. Notice

Class actions under Rule 23(b)(2) are not subject to the individual notice requirements of Rule 23(c)(2). *See* 2 Newberg § 8.05. Instead, notice in such class actions is discretionary under Rule 23(d)(2). Here, because the relief sought would be applicable to the class members generally, with little or no likelihood of conflicting interest among class members, it appears at this stage of the litigation that no notice is required. This ruling, however, is without prejudice to future motions seeking notice under Rule 23(d)(2).

E. Conclusion as to Class Certification

In light of the foregoing, the Court certifies the following class: persons who (1) are charged with crimes, (2) held in County custody, (3) whose charges may be dismissed (4) under an order directing their release from County custody.

III. PRELIMINARY INJUNCTION

A. Legal Standard

The party seeking a preliminary injunction must show either (1) a combination of probable success on the merits and the possibility of irreparable injury if relief is not granted, or (2) the existence of serious questions governing the merits and that the balance of hardships tips in its favor. *See International Jensen, Inc. v. Metrosound U.S.A., Inc.*, 4 F.3d 819, 822 (9th Cir. 1993). These standards "are not separate tests but the outer reaches of a single continuum." *Id.* In addition, in cases affecting the public interest, the court must consider whether the public interest

will be advanced by granting preliminary relief.[5] *See Miller v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994).

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[5] Additionally, the Sheriff contends that injunctive relief in this action must meet the standards of the Prison Litigation Reform Act of 1996 ("PLRA"). In the PLRA, Congress limited the availability and scope of federal injunctions regarding prison and jail conditions. *See* 18 U.S.C. § 3626(g)(5) (defining "prison" to include local facilities that detain juveniles or adults accused of crimes). The PLRA requires that in any civil case involving prison conditions, any prospective relief "shall extend no further than necessary to correct the violation of the Federal right of a particular plaintiff or plaintiffs" and that the Court make findings that any prospective relief is [sic] "is narrowly drawn, extends no further than necessary to correct the violation of the Federal right, and is the least intrusive means necessary to correct the violation of the Federal right." 18 U.S.C. § 3626(a)(1)(A). In addition, before granting prospective relief under the PLRA the court must "give substantial weight to any adverse impact on public safety or the operation of a criminal justice system caused by the relief." *Id.*

The PLRA does not apply to this action. The PLRA applies to any "civil action with respect to prison conditions." 18 U.S.C. § 3626(a)(1), (2). This phrase is defined in the PLRA as

> any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2). The claims in this case do not involve constitutional violations arising from the conditions of confinement. Instead, the plaintiffs contend that the Constitution is violated by a systemic policy of continuing to hold individuals in confinement after a judicial order of release.

In addition, although the PLRA does not apply, the Court, in applying the equitable standard for preliminary injunctive relief, has considered the potential adverse effects on public safety, and has narrowly drawn the prospective relief granted in this order to extend no further than necessary to protect the federal right.

The Ninth Circuit applies a rigorous factual review where the district court enjoins a state law enforcement agency. In such cases, there must be a strong factual showing of a pervasive pattern of police misconduct. *See Thomas v. City of Los Angeles*, 978 F.2d 504, 508 (9th Cir. 1992) (citing *Rizzo v. Goode*, 423 U.S. 362, 375 (1976)).

B. Preliminary Findings of Fact

For purposes of ruling on the preliminary injunction motion, the Court makes the following preliminary findings of fact.[6]

1. The evidence before the Court indicates that the Department has a policy to process released detainees by taking the following steps in the following order:

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[6] In making these findings, the Court relies on the deposition of the Sheriff attached as an exhibit to the original complaint, and on the declaration of Lieutenant Mike Walker.

The Court does not rely on the newspaper article submitted by the plaintiff in a post-argument brief seeking judicial notice. (*See* Plaintiff's Rule 28(j) Analog, filed July 21, 1998; *see also*, Defendants' Objection to Plaintiffs' Submission of "Rule 28(j) Analog" Statement, filed July 29, 1998.) The factual assertions contained in the article are not subject to judicial notice because they are not facts commonly known or capable of accurate or ready determination. *See* Fed. R. Evid. 201(b). Nor are the assertions, as the plaintiffs contend, adoptive admissions of the defendants. The article attributes the statement to no one in particular, leaving the Court unable to determine whether the purported maker of the statement was authorized to make it. In addition, the article presents a double hearsay problem; even if the statement *to* the reporter were an admission, the statement *by* the reporter is hearsay outside of any applicable exception. The Court therefore disregards the newspaper article.

(a) After a detainee is acquitted or otherwise ordered released, the detainee is returned to jail[7] for processing of release.

(b) The Department continues to hold the individual in jail, and does not begin the process of releasing the individual until the Department confirms that the individual is not wanted by another law enforcement or correctional agency. (*See* Block Depo. at 29:12-20, 31:20-25, 33:11-15, 48:15-49:19.) The Department makes this determination by checking the detainee's record in a computer database known as the Automated Justice Information System (the "AJIS"). The Department policy is to wait to perform this computer check until all of the wants and holds that arrived on the day that the detainee was ordered released have been entered into the AJIS. Because of the volume of orders received, averaging 3,000 to 5,000 per day, the entry of any given day's orders is often not completed until late the following day, and sometimes not until midnight of the following day.

(c) Only after the AJIS has been updated, and the Department has checked a released detainee's AJIS record for wants and holds, does the Department begin the administrative steps incident to release.

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[7] Male detainees are brought to the Inmate Reception Center ("IRC") for release processing. Female detainees are brought to the Sybil Brand Institute for Women ("SBI") for release processing. (*See* Los Angeles County Sheriff's Department Manual of Policy and Procedures § 5-03/005.00 at 5-03/1 (1996).) The Court takes judicial notice of the manual under Rule 201(c) of the Federal Rules of Evidence.

2. The Department applies the above-described policy in the administration of the County jail system, which consists of several jails with a total average daily population of 20,000 to 22,000 inmates and detainees.[8] (*See* Walker Decl.[9] ¶ 3.) Annually, the Department books and releases an average of 200,000 to 220,000 detainees. (*See id.* ¶ 3.)

3. Every weekday, the Department transports an average of 1,800 to 2,000 inmates and detainees from its jail facilities to the courts. (*See id.* ¶ 6.)

4. The IRC, which processes the release of male detainees,[10] is contacted 24 hours a day by other law enforcement and correctional agencies in order to place holds on the release of detainees. (*See id.* ¶ 7.) The Department usually receives such holds by telephone or teletype. (*See id.*) The holds transmitted in this manner

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[8] The Sheriff refers to all persons in county custody as "inmates." In order to be precise, the Court employs "inmates" to describe individuals who have been convicted of crimes and whose sentences include incarceration in the County jail system. The plaintiff class in this action does not include inmates. The Court employes "detainees" to describe individuals who are being held on a finding of probable cause and are awaiting trial. All members of the plaintiff class in this action are detainees.

[9] The factual findings regarding the operation of the County jail system are based on the declaration of Mike Walker, the Administrative Lieutenant for the IRC. (Walker Decl. ¶ 1.) The IRC processes all male inmates and detainees leaving the County jail system.

[10] According to the Department manual, female detainees are processed by the SBI. (*See* Los Angeles County Sheriff's Department Manual of Policy and Procedures § 5-03/005.00 at 5-03/1 (1996).) The parties, however, have not presented evidence regarding the release procedures followed at the SBI for female detainees.

include immigration holds and holds placed by the State Board of Prison Terms regarding parole violations. (*See id.*)

5. Each weekday, the IRC receives an average of 3,000 to 5,000 paper transmittals from 10 superior court districts and 32 municipal court districts in the County. (*See id.* ¶ 8.) These transmittals include a number of different types of orders. Some of these orders affect the status of detainees, either by ordering or authorizing a detainee's release, or by requiring the Department to hold a detainee for another agency. (*See id.* ¶ 11.)

6. The superior and municipal courts send paper transmittals to the IRC by placing them in bags to be transported on the same buses used by the Department to transport detainees to and from the courts. (*See id.* ¶ 9.)

7. The peak volume of bus arrivals at the IRC from the courts occurs between 6:00 p.m. and 7:00 p.m. (*See id.* ¶ 9.)

8. Bags of paperwork from the courts are emptied by clerks at the IRC. The clerks then read and interpret each paperwork item to determine what effect it has on the status of the inmate or detainee to whom it refers. This task is made more time-consuming by the use of several different types of forms, and by incidents in which court personnel make contradictory or inconsistent notations on the form. After interpreting the form, the IRC clerk enters the resulting changes in inmate or detainee status in the AJIS. (*See id.* ¶¶ 10-11.)

9. Counsel for the Sheriff represented during oral argument that the task of entering one day's paperwork into the AJIS is often not completed until the

evening of the following day, and sometimes past midnight of the following day.

10. The Department is currently developing a plan to connect the superior and municipal court computers to the AJIS, in order to eliminate the paper transmittal of orders. (*See id.* ¶ 14.) The Department predicts that electronic transmittal of orders will eventually allow detainees to be released directly from court after a check of the electronically updated AJIS from the courthouse. (*See id.*)

11. After the AJIS has been updated, the Department begins taking the administrative steps necessary to release the detainee. These steps include:

(a) checking the updated AJIS for wants and holds;

(b) positively identifying the released detainee using fingerprints to prevent erroneous releases caused by detainees' switching of wristband identifications. (*see id.* ¶ 15);

(c) returning the detainee's personal property (*see id.* ¶ 14); the Department will in some instances release a detainee without returning his property, allowing the detainee to return to the IRC later to pick up his property (*see id.* ¶¶ 14, 16); and

(d) updating the Department's records to reflect the detainee's release.

12. The Department policy of returning detainees to the IRC after a release order includes an exception for instances where the court explicitly orders a detainee released "in court." (*See* Walker Decl. ¶ 16 (referring to

in-court release procedure set forth in the Department manual).) The Department manual only allows in-court releases when the judge "specifically directs the deputy having custody of the prisoner to release the inmate 'in court.'"[11] If the judge orders the detainee released

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[11] The Court takes judicial notice under Federal Rule of Evidence 201(c) of the 1996 edition of the Department manual. The manual includes the following provision regarding in-court releases:

> Under no circumstances shall a prisoner be released directly from Court except following a direct order by a judge. A prisoner ordered released "forthwith" or "immediately" shall be returned to IRC/SBI unless the judge specifically directs the deputy having custody of the prisoner to release the inmate "in court."

When a judge orders a prisoner released "in court," the deputy having custody of the prisoner shall:

- Obtain the release order from the court specifying the release is to "in court,"
- Obtain the release authorization from IRC/SBI by telephone,
- Indicate the date, time, and name of the document analyst (IRC/SBI) authorizing the release, on the reverse side of the court release order,
- Establish positive identification of the prisoner to be released (the identification band worn by the inmate is not considered positive identification). If positive identification of the prisoner cannot be established by personal knowledge of the bailiff or court personnel, the judge shall be so informed. The judge will be asked to permit the prisoner to be returned to IRC/SBI for fingerprint comparison and expedited release. When necessary, special transportation may be provided. If the judge denies the request, the bailiff will release the prisoner and document the circumstances.

(Los Angles County Sheriff's Department Manual of Policy and Procedures § 5-03/130.05, at 5-03/32 (1996).)

" 'forthwith' " or " 'immediately,' " the manual requires that the detainee be returned to the IRC or SBI for processing.

13. The majority of detainees are processed for release after the Department receives an order written on a superior court form which begins as follows: "This is to authorize you to release" the detainee. (*See* Walker Decl. ¶ 10 and Ex. thereto.) Most court clerks add the following notation to the form: "This Case Only." (*See id.*)

14. A recently reported decision of this Court found that an acquitted detainee who had received an unambiguous order stating "[d]efendant is released" was held by the Department for an additional twenty-four to forty-eight hours pursuant to the Department's policy of continuing to hold released detainees for purposes of performing an updated AJIS check for wants and holds. *See Fowler v. Block*, 2 F. Supp. 2d 1268, 1276 & 1279 n.8 (C.D. Cal. 1998).

15. There is no causal connection between the court order to release a detainee and the arrival of a new want or hold against the detainee. Counsel for the Sheriff acknowledged the lack of a causal connection during oral argument. Wants or holds are no more likely to arrive on the same day as the release order than on any other day before or after the release order.

C. Standing

In order to establish a likelihood of success on the merits, the plaintiffs must show that they have standing to bring this action.

The standing issues are analyzed above in the class certification discussion. (*See, supra*, at pp. 7-11.) The named plaintiffs in this action have demonstrated standing by alleging that they are in detention, and by presenting evidence that the department has a consistent policy of keeping released detainees for want and hold checks. (*See* "Preliminary Findings of Fact," *supra*, at pp. 16-22.)

D. Likelihood of Success on the Merits

"To sustain an action under section 1983, a plaintiff must show (1) that the conduct complained of was committed by a person acting under color of state law; and (2) that the conduct deprived the plaintiff of a federal constitutional or statutory right." *Wood v. Ostrander*, 879 F.2d 583, 587 (9th Cir. 1989).

1. What constitutional standard applies?

The parties dispute the issue of what constitutional framework should be applied to over-detention claims. The plaintiffs contend that over-detention violates their Fourth Amendment right to be free from unreasonable seizure, and their Fourteenth Amendment right to be free from deprivation of liberty without due process. The Sheriff contends that only the due process clause applies. Before determining whether the plaintiffs have shown a likelihood of success on the merits, it is necessary to determine what constitutional standard applies. *See County of Sacramento v. Lewis*, ___ U.S. ___, 118 S. Ct. 1708, 1714 n.5 (1998) ("As in any action under § 1983, the first step is to identify the exact contours of the underlying right said to have been violated.").

Constitutional claims arising from improper confinement are examined using either a due process or Fourth Amendment analysis. *See Mackinney v. Nielsen*, 69 F.3d 1002, 1009 (9th Cir. 1995). In cases where the plaintiff challenges the lawfulness of confinement prior to a judicial determination of probable cause for a warrantless arrest, the Ninth Circuit employs a Fourth Amendment analysis. *See id.* In cases where the plaintiff challenges the length of confinement after a determination of probable cause, a due process analysis applies. *See Baker v. McCollan*, 443 U.S. 137 (1979); *Armstrong v. Squadrito*, ___ F.3d ___, 1998 WL 416887 *4 (7th Cir. July 24, 1998); *Mackinney*, 69 F.3d at 1009; *Villanova v. Abrams*, 972 F.2d 792, 797 (7th Cir. 1992).

Where the Fourth Amendment applies to a constitutional claim, the claim must be analyzed under the more specific guarantee against unreasonable seizure, rather than under the more generalized notion of Fourteenth Amendment substantive due process. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (plurality); *Graham v. Connor*, 490 U.S. 386, 395 (1989). This case, however, must be analyzed under both the Fourth Amendment and the Fourteenth Amendment, because the plaintiffs challenge two distinct sources of delay, each of which is governed by a different constitutional right.

First, the plaintiffs challenge administrative delay. Administrative delay is caused by the steps necessary to implement the release order. Such steps include transportation, confirming the acquitted detainee's identity through fingerprinting or other methods, checking for wants and holds already in the AJIS, returning the detainee's property, and physically allowing the detainee to leave the jail. The permissible length of these steps is

governed by substantive due process, because these functions are part of the Sheriff's responsibility to properly run the jail. *See Block v. Rutherford*, 468 U.S. 576 (1984); *Bell v. Wolfish*, 441 U.S. 520 (1979). The burdens that this administrative delay places on the plaintiff class members can be understood as part of their transition from confinement to freedom.

Second, the plaintiffs challenge investigative delay. Investigative delay results from the Department policy to defer commencement of the administrative steps described above until the Department staff has updated the AJIS with wants and holds received during the day. The Sheriff's decision to extend confinement of acquitted detainees for this purpose exceeds the scope of both the initial finding of probable cause, and of the Sheriff's authority to implement the release order in a manner consistent with his responsibility to properly manage the jails. Because this investigative delay exceeds the scope of the Sheriff's lawful authority over the released detainee, it constitutes a re-arrest, and must be analyzed under the Fourth Amendment standard for reasonable seizures. Because the more specific guarantees of the Fourth Amendment apply to this investigative delay, the Court must apply the more specific Fourth Amendment standard, rather than the generalized substantive due process standard under the Fourteenth Amendment.

2. Administrative Delay: Substantive due process limits the Sheriff's authority to continue holding an acquitted pretrial detainee

After the government's authority to hold the individual is established under the Fourth Amendment, the

conditions and duration of the detention are governed by substantive due process.[12] Substantive due process limits

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[12] The Court notes that the rights of convicted inmates to be released at the proper time as provided by indeterminate sentencing statutes are governed by a procedural due process standard. *See Haygood v. Younger*, 769 F.2d 1350 (9th Cir. 1985) (en banc). *Haygood*, however, does not control this case. In *Haygood*, the California Adult Authority, applying the indeterminate sentencing statute then in force, miscalculated the prisoner's sentence, causing him to he [sic] held in prison five years after he should have been released. *Id.* at 1354. The constitutional violation in *Haygood* was deprivation of a liberty interest created by the state sentencing statute. *Id.* at 1355. Sentencing statutes do not create substantive rights; instead they create the right to have certain procedures followed to ensure an accurate calculation of the sentence. The holding in *Haygood* is based on the principle that convicted prison inmates have a due process right to fair administration of the statute under which their sentences are calculated. *Id.*

Here, however, a pretrial detainee's interest in being released after an order of acquittal is not created by a statute for calculating the period in which a pretrial detainee may be held. Instead, the pretrial detainee, upon acquittal of the charge for which he is being detained, regains his substantive liberty interest in freedom from confinement by government without lawful authority.

Also distinguishable are cases involving a convicted inmate's right to be released from incarceration pursuant to a probation order, or to be released from a more restrictive to a less restrictive form of incarceration. *See Walters v. Grossheim*, 990 F.2d 381, 384 (8th Cir. 1993) (holding that failure of prison officials to comply with habeas writ ordering prisoner moved to less restrictive level of detention deprived prisoner of liberty interest under Fourteenth Amendment due process); *Stone v. Herman*, 983 F.2d 107, 110 (8th Cir. 1993) (holding that continued detention of prisoner after order suspending his sentence deprives prisoner of liberty interest under Fourteenth Amendment due process); *Salahuddin v. Coughlin*, 781 F.2d 24 (2d Cir. 1986). as in *Haygood*, the constitutional violations in these cases arose from the convicted prisoners' liberty interests in the fair administration of state statutes governing the length and conditions of their sentences. Such cases do not address the situation of a person who was being held only on probable cause of having committed a crime, who is acquitted of that

(Continued on following page)

the conditions under which the individual may be held, *Bell*, 441 U.S. at 536, the length of time during which the individual may be held before his next judicial appearance, *Coleman v. Frantz*, 754 F.2d 719 (7th Cir. 1985), and, most important for this case, whether the government may continue to hold the individual when new circumstances arise that undermine the government's lawful authority to continue the detention, *Duckett v. City of Cedar Park, Tex.*, 950 F.2d 272, 279 (5th Cir. 1992).

"The concept of 'substantive due process' . . . forbids the government from depriving a person of life, liberty, or property in such a way that shocks the conscience or interferes with rights implicit in the concept of ordered liberty." *Nunez v. City of Los Angeles*, 147 F.3d 867, 871 (9th Cir. 1998) (quoting *United States v. Salerno*, 481 U.S. 739, 746 (1987)). The standards for determining whether executive action offends substantive due process are "less rigid and more fluid than those envisaged in other specific and particular provisions of the Bill of Rights." *County of Sacramento v. Lewis*, 118 S. Ct. at 1719 (internal quotation marks omitted). Instead of applying a formal set of fixed elements to any challenged executive practice, the Court must examine the totality of the circumstances to determine whether the challenged practice represents a deliberate abuse of power that shocks the conscience. *See id.* at 1718-19.

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crime, and who is in effect re-arrested without probable cause to check for wants and holds.

In light of the foregoing, the Court concludes that the procedural due process standard applied in *Haygood* does not control this case.

Although the substantive due process test is fluid, for purposes of clarity, the Court must follow a basic framework in analyzing the totality of the circumstances. The Supreme Court has recently reiterated that the ultimate question of law under substantive due process is whether the challenged executive action "shocks the conscience" or "interferes with rights implicit in the concept or ordered liberty." *Id.* at 1717. Although the phrase "shocks the conscience" carries the "unfortunate connotation of a standard laden with subjective assessments," the standard does not depend on the subjective impression that the challenged practice makes on the Court. *Id.* at 1722 (Kennedy, J, concurring). Instead, the standard depends on the following three inquiries:

(1) Does the due process clause protect against the challenged executive's[13] conduct? This inquiry focuses on the individual interest threatened by the challenged government action. Not all individual interests affected by government action receive constitutional protection. *Compare Nunez*, 147 F.3d at 873-74 (holding that police officers' interest in promotion to higher rank is not protected by substantive due process against arbitrary government action), *with*, *Armstrong*, ___ F.3d at ___, 1998 WL 416887 *8 (holding that individuals arrested pursuant

[13] In *County of Sacramento v. Lewis*, the Court noted that the criteria for examining government conduct under substantive due process "Differ depending on whether it is legislation or a specific act of a governmental officer that is at issue." 118 S. Ct. at 1716. The challenged policy here is executive. The Court therefore applies the standards set forth in *County of Sacramento v. Lewis* for examining executive actions.

to valid warrants have a protected interest under substantive due process against needlessly prolonged detention before first appearance in court). The Supreme Court often expresses the distinction between protected and unprotected interests by repeating the formula that the Constitution must not be transformed into "a font of tort law." *County of Sacramento v. Lewis*, 118 S. Ct. at 1717-18; *Daniels v. Williams*, 474 U.S. 327, 332 (1986); *Paul v. Davis*, 424 U.S. 693 (1976).

(2) Does the executive's level of culpability offend the standards of substantive due process? An injury that results from mere negligence cannot be characterized as an abuse of power, and therefore does not offend substantive due process. *See County of Sacramento v. Lewis*, 118 S. Ct. at 1718. By contrast, an injury that results from the executive's deliberate indifference may rise to the level of a substantive due process violation, depending on the totality of the circumstances. *Compare id.* at 1721 (holding that in the context of a high-speed police pursuit in which a police officer had no time for deliberation, deliberate indifference is not sufficient to establish a substantive due process violation; intent to injure is required), *with*, *id.* at 1719 (noting in dicta that deliberate indifference to the welfare of inmates and pretrial detainees is sufficient to make out constitutional violations because prison officials have time to deliberate, except in riot conditions, which are governed by a different standard).

(3) Does the executive's conduct shock the conscience? This final step is essentially a reprise of the first two steps. Whether the challenged conduct shocks the conscience depends on the importance of the threatened interest, the extent of the injury to that interest, and the level of culpability of the government actors in light of the

factual circumstances. *See Armstrong*, ___ F.3d at ___, 1998 WL 416887 *18.

The Court applies these three questions to the period of administrative delay and concludes that the administrative delays here do not offend substantive due process.

a. Does the due process clause protect individuals against continued detention after an order of release?

"To establish a substantive due process claim, a plaintiff must, as a threshold matter, show a government deprivation of life, liberty, or property." *Nunez*, 147 F.3d at 871.

There can be no question that the plaintiffs in this case have asserted a protected liberty interest. Freedom from physical restraint or confinement in the absence of lawful authority "has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action." *Foucha v. Louisiana*, 504 U.S. 71, 80 (1992); *see also*, *Oviatt v. Pearce*, 954 F.2d 1470, 1474 (9th Cir. 1992) ("the paradigmatic liberty interest under the due process clause is freedom from incarceration"). When the government loses lawful authority to detain an individual, continued detention violates substantive due process. *See McNeil v. Director, Patuxent Inst.*, 407 U.S. 245 (1972).

During the period of pretrial detention, the Sheriff's lawful authority to hold a detainee derives from a judicial finding of probable cause. *See Gerstein*, 420 U.S. 103; *Baker*, 443 U.S. at 143. The situation changes radically, however, when the pretrial detainee is acquitted of the charge on which he is being held, or when a judge orders

him released. At that moment the Sheriff's lawful authority over the individual is greatly diminished. There is little case authority on the degree to which the government's authority over the individual is diminished at this point. Neither the Ninth Circuit nor the Supreme Court has addressed the question of how much authority the government retains over an acquitted pretrial detainee.[14]

The Seventh Circuit has addressed the question by drawing an analogy to the Fourth Amendment limits on the length of time a warrantless arrestee can be held without a judicial determination of probable cause. *See Lewis v. O'Grady*, 853 F.2d 1366 (7th Cir. 1988). A recent decision of this Court has looked to *Lewis v. O'Grady* to determine whether a prolonged detention to check for wants and holds was reasonable for purposes of qualified immunity. *See Fowler*, 2 F. Supp. 2d at 1278. In *Lewis v. O'Grady* the plaintiff had been held an additional eleven hours after he was ordered released. The plaintiff brought a § 1983 claim based on the over-detention. The district court entered a directed verdict for the defendants, concluding that no reasonable jury could find that eleven hours was an unreasonable delay. The Seventh Circuit reversed, holding that it was for the jury to decide whether eleven hours was reasonable in light of the administrative demands on the sheriff's department. *See id.*, 853 F.2d at 1370. The Seventh Circuit reached its holding by making

[14] The exception to this statement involves acquittals by reason of insanity. Where a criminal defendant is acquitted by reason of insanity, the Constitution allows continued detention as long as the individual remains dangerously mentally ill. *See Foucha*, 504 U.S. at 79-80; *Jones v. United States*, 463 U.S. 354, 370 (1983).

an analogy to the Fourth Amendment standard governing the reasonableness of the delay between a warrantless arrest and a judicial determination of probable cause. *See id.* The Seventh Circuit reasoned that although the situations are different, the reasonableness of an administrative delay would depend on several of the same factors governing the period of reasonable detention for warrantless arrestees, including "such matters as transportation, identity verification, and processing." *See id.*

In applying the reasoning of *Lewis v. O'Grady* to a damages action arising from the same policy challenged here, the Court in *Fowler* analyzed the period of time after an order of release by separating the activity performed by the sheriff's department into two categories: (1) "administrative tasks" incident to releasing the individual, and (2) the "check for wants and holds." *See Fowler*, 2 F. Supp. 2d at 1277-79.

The *Fowler* court concluded that the activities defined in this order as administrative delay – the administrative steps necessary to execute a court order of release – were within the Sheriff's continued authority over the acquitted detainee, and did not offend due process if the time taken was reasonable in light of the circumstances. *See id.* at 1278-79. Permissible administrative steps after acquittal include fingerprinting the acquitted detainee to confirm that he is the person ordered released, noting the release in the department's records, and returning the detainee's property. The court concluded that due process allowed a reasonable delay in performing these activities, the length of which must be determined by institutional factors such as the number of people to be processed. *See id.*

The *Fowler* court analyzed the check for wants and holds separately from the other administrative steps incident to release. The court reasoned that the check for wants and holds could have been performed in the morning, before the detainee was brought to the court appearance at which he was later acquitted. *See id.* at 1279. The court therefore concluded that delaying release for the purpose of checking wants and holds unreasonably prolonged the detention.

The present case is distinguishable from *Fowler*. The Sheriff has now presented evidence that checking for wants and holds that are already in the AJIS is not the only cause of the delay. (*See* Walker Decl. ¶¶ 7-9, 11-15.) The Sheriff is clearly entitled to check whether a released detainee is eligible to be released.[15] Therefore, checking the AJIS for wants and holds is a logical part of the administrative steps incident to release. Any delay caused by retrieving information in the AJIS, provided it is reasonable, does

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[15] The Court notes the Sheriff's contention that one of the administrative steps incident to release is a determination of whether the Sheriff is holding the individual on one case or several cases. The Sheriff points to a notation on many release orders indicating that the detainee is released for "this case only." The distinction between such an order and the order in *Fowler*, which read "defendant is released," is not meaningful, even though "defendant is released" appears on its face to be more definite. *See Fowler*, 2 F. Supp. 2d at 1276. The court issuing a release order has jurisdiction only over the case before it. An order stating "defendant is released" contains the implied term "on this case only" because the court issuing the order has jurisdiction only over the case before it. Either order – "defendant is released" or "defendant is released on this case only" – requires the Department to determine whether it is holding an individual only on the terminated case, or on other cases as well. Such a determination, like the check for wants and holds, is one of the reasonable administrative steps incident to release.

not violate the Constitution. The delay complained of here results from the policy of not checking the AJIS until after the department has input into the AJIS all new wants and holds received during the day. In order to remedy the constitutional violation caused by such delay, however, it is not necessary to prohibit the Sheriff from conducting any checks for wants and holds after a detainee is ordered released.[16] It is important to distinguish between wants and holds of which the department already has knowledge, i.e., that are already entered into the AJIS, and wants and holds which the Department speculates may exist. As noted above, an AJIS check for wants and holds already known to the Department is one of the administrative steps incident to release. In contrast, the policy of deferring checking for wants and holds to investigate the speculative existence of unknown wants and holds is not within the Sheriff's lawful authority under the Fourteenth Amendment due process clause, and must be analyzed as a re-seizure of the released detainee under the Fourth Amendment.

In summary, the Court here departs from the *Fowler* analysis and holds as follows: (1) An AJIS check after a

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[16] Additionally, unlike in *Fowler*, the Sheriff has presented facts to demonstrate that it would be unduly burdensome to perform the check for wants and holds in the morning before detainees are transported to court. The Department does not know in the morning which of the 1,800 to 2,000 transported inmates and detainees will be ordered released during the day. (*See* Walker Decl. ¶¶ 6-9.) Until a detainee is ordered released, there is no reason to check for wants and holds. Based on the evidence presented here, the Court finds that the check for wants and holds already in AJIS can be performed after a detainee is ordered released without significantly delaying the administrative steps incident to release.

detainee is ordered released does not violate substantive due process if it does not significantly prolong the administrative steps incident to release. (2) The policy of deferring the AJIS check until all newly received paperwork has been processed must be analyzed under the Fourth Amendment and results in an unreasonable seizure if the department does not have probable cause to believe that wants or holds exist for the detainees whose confinement is prolonged while the AJIS check is deferred. This Fourth Amendment holding is discussed in greater detail below, in a separate section of this order.

b. Does the executive's level of culpability offend the standards of substantive due process?

As noted above, the due process clause is concerned with abuses of executive power, and not with negligently inflicted harm. *See County of Sacramento v. Lewis*, 118 S. Ct. at 1718. Thus, if the policy complained of here results in over-detentions only because the persons applying it occasionally apply it without due care, the resulting injuries would not be constitutional violations. *See Erdman v. Cochise County*, 926 F.2d 877, 882 (9th Cir. 1991) (holding that arrest of plaintiff on felony warrant after charges had already been adjudicated resulted from an isolated instance of negligence, and therefore did not rise to the level of a constitutional violation); *Harris v. City of Marion*, 79 F.3d 56, 59 (7th Cir. 1996) (holding that isolated negligent incident does not establish deliberate indifference in otherwise inoffensive policy). If, on the other hand, the policy regularly results in released detainees being held without lawful authority, continued application of the policy rises to the level of deliberate

indifference. *See Armstrong*, ___ F.3d ___, 1998 WL 416887 *16.

Under this standard, delays resulting from negligent performance of the administrative steps incident to release do not offend substantive due process. These steps are within the Sheriff's lawful authority. Isolated instances of failure to exercise these steps with due care do not give rise to a constitutional violation. The plaintiffs have not presented facts to demonstrate a pattern of incidents in which the administrative steps are allowed to continue for an unreasonably long period of time. If such a pattern exists, and the Department is aware of it, the pattern may support a finding of deliberate indifference. This question, however, is not currently before the Court.

c. Does the executive's conduct shock the conscience?

Based on the record before the Court, the administrative delays in release do not shock the conscience. As noted above these steps are performed pursuant [sic] the Sheriff's authority to carry out orders of release. A reasonable period of delay to carry out these steps is not an arbitrary exercise of government power. These steps are necessary to fulfill the legitimate government purpose of ensuring that the order of release is properly executed, and that the correct person is released. *See Fowler*, 2 F. Supp. 2d at 1277-78 (noting the necessary purposes served by the administrative steps incident to release). Substantive due process, however, does limit the length of time that the Sheriff can take to perform these administrative steps. As discussed above, the permissible length of time will vary depending on institutional factors such as the number of people to be processed, the necessary transportation, and

the state of the available technology. The facts presented on the preliminary injunction motion do not establish that the time currently taken for such administrative steps constitutes a deliberate abuse of power that deprives detainees of liberty in a manner that shocks the conscience.

It is important to note, however, that this conclusion does not govern the investigative delays – the delays resulting from the Sheriff's policy to defer the administrative steps incident to release until the AJIS system has been updated. As noted above, investigative delays of any length exceed the Sheriff's lawful authority and must be analyzed as a re-seizure under the Fourth Amendment.

3. Investigative Delay: The Fourth Amendment bar on re-seizure without reasonable suspicion or re-arrest without probable cause

Investigative delays – those delays that result from the policy of deferring release until the AJIS is updated – restrict the liberty of individuals after a court has either ordered their release or concluded that the lawful authority to hold them on the case before the court no longer exists. After receiving such an order, the Department may no longer treat the individual as a pretrial detainee, but as a former detainee, over whom the department's authority extends no further than necessary to execute the court's order directing release. The force of a court order negating the lawful authority to hold an individual requires that any continued detention beyond the period necessary to execute the order be analyzed as a new arrest under the Fourth Amendment. To analyze the situation any other way would be to denigrate the seriousness of a judicial order. *Cf. Slone*, 983 F.2d at 110; *Coverdell v. Dep't of*

Social and Health Services, 834 F.2d 758, 765 (9th Cir. 1987) (noting that "[t]he fearless and unhesitating execution of court orders is essential if the court's authority and ability to function are to remain uncompromised.").

As noted above, substantive due process allows the Sheriff to check for wants and holds against an acquitted detainee while the Sheriff retains lawful authority to hold the individual, i.e., at any time before the acquittal or order of release, or during the time reasonably necessary to carry out the administrative steps incident to release.

In order to continue holding the detainee past this point, however, the Sheriff must meet the reasonable seizure standards of the Fourth Amendment. These standards are clearly defined. On a reasonable, articulable suspicion that the defendant has committed a crime, or is wanted for a past crime, the Sheriff may hold him for a brief period to confirm or deny the suspicion. *See Terry v. Ohio*, 392 U.S. 1 (1968); *United States v. Hensley*, 469 U.S. 221, 227-30 (1985) (extending *Terry* to allow investigative stops on reasonable suspicion that person is wanted for a prior crime). On a showing of probable cause, the Sheriff may arrest the individual, holding him for a longer period and under more intrusive circumstances than are permitted in a *Terry* stop. *See United States v. Ayarza*, 874 F.2d 647, 650 (9th Cir. 1989).

The policy challenged here results in seizures that are supported by neither probable cause nor reasonable suspicion. The Sheriff acknowledges that there is no causal connection between the date on which an individual is acquitted or ordered released and the appearance of a new want or hold.

The Sheriff has not contended that a released detainee's mere status as someone who had previously been charged with a crime gives rise to probable cause or reasonable suspicion that the released detainee is wanted for other crimes. Such a contention would have no support in Fourth Amendment law. The prior arrest does not provide authority under the Fourth Amendment to prolong the period of pretrial detention for the purpose of investigating other crimes, unless probable cause has already been established to believe that the person has committed a crime. *See County of Riverside v. McLaughlin*, 500 U.S. 44, 56 (1991) (noting that judicial determination of probable cause for warrantless arrest may not be delayed for the purpose of seeking evidence needed to establish probable cause); *Willis v. Chicago*, 999 F.2d 284, 289 (7th Cir. 1993) (holding that judicial determination of probable cause may not be delayed for the purpose of investigating other crimes).

In light of the foregoing, the Court concludes that the plaintiffs have made the requisite showing of the likelihood of success on the merits of their claim that the Sheriff's policy to impose investigative delays on released detainees violates the Fourth Amendment by causing released detainees to be re-seized without probable cause or reasonable suspicion. The evidence before the Court constitutes a strong factual showing that the Department maintains an intentional and pervasive policy, in violation of the Fourth Amendment, to prolong detention of individuals over whom the Sheriff no longer has legal authority based only on speculation that a new want or hold may have arrived for them. *See Thomas*, 978 F.2d at 508.

E. Irreparable Injury, Balance of Hardships, and Public Interest

When a deprivation of constitutional rights is involved, most courts hold that no further showing of irreparable injury is necessary. *See Gutierrez v. Mun. Court of Southeast Judicial Dist., County of Los Angeles*, 838 F.2d 1031, 1045 (9th Cir. 1988). This presumption of irreparable injury does not apply where the damage to the plaintiff is purely economic. *See Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285-86 (11th Cir. 1990). It is clearly established that prolonged detention without probable cause works an irreparable injury on the detainee. *See Gerstein*, 420 U.S. at 114 ("The consequences of prolonged detention may be more serious than the interference occasioned by arrest. Pretrial confinement may imperil the suspect's job, interrupt his source of income, and impair his family relationships.").

Where, as here, the public will be affected by the injunctive relief sought, the Court must consider the public interest. *See Miller v. California Pac. Med. Ctr.*, 19 F.3d 449, 456 (9th Cir. 1994). As noted above, the Court acknowledges the defendants' responsibility to protect the public against erroneous releases of detainees who are wanted for serious crimes other than the ones on which the defendants were detaining them. At the same time, the public has a strong interest in the protection of constitutional rights, and in the prevention of incidents in which released detainees who have no wants or holds are unlawfully kept from their homes, jobs and families for a substantial period after a court has ordered them released.

The Court recognizes that in order to comply with an injunction requiring prompt checks for wants and holds,

the Department will have to change the procedures for processing wants and holds and for releasing pretrial detainees. The Court notes, however, that the Department has already begun automating the entry of wants and holds into AJIS, a process which, if completed, would remove any purported need to delay court-ordered releases while the system is updated. (*See, supra*, Finding of Fact No. 11.) In order to prevent harm to the public interest that would result from erroneous releases during a transition period, the Court finds it appropriate to stay the execution and enforcement of this preliminary injunction for sixty days after the filing date of this order.

F. Miscellaneous Injunctive Remedies

1. Modifying the Department's Settlement/ Release Forms

The plaintiffs seek an order mandating that the Department add the following language to its settlement/release form:

> You should consult with a lawyer before signing this form. If you sign this form, you may revoke your agreement within 30 days.

(Mot'n at 7.)

The form currently in use by the Department is attached to the Declaration of Tom Laing, Lieutenant in charge of the Sheriff's Risk Management Bureau's Civil Litigation Unit. (Opp'n Ex. C.) The current letter includes the following notice in bold, italic type:

> You have the right to consult an attorney before agreeing to the specific amount and the release and settlement of your claim.

(*Id.* at Bates 30.)

The Court finds no legal basis for an order requiring the Department to modify its settlement offer to include the 30-day revocation term.

The motion for a preliminary injunction is therefore denied as to this issue.

G. Court Ordered Over-Detention Claim Form and Monitoring

The plaintiffs seek an order mandating that the Department distribute to every detainee the claim form reproduced at pages 5-6 of the Motion for Preliminary Injunction. The order would require the Department to distribute this form to every detainee every five days. A copy of each form would be filed with the Court every Monday.

The Court finds no legal basis for imposing a court-monitored, over-detention claim system on the Department at this time. The motion for preliminary injunction is therefore denied as to this issue.

IV. THE SHERIFF'S MOTION TO DISMISS

Under Federal Rule of Civil Procedure 12(b)(6), a federal court cannot dismiss a complaint for failure to state a claim unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief. *See Moore v. City of*

Costa Mesa, 886 F.2d 260, 262 (9th Cir. 1989). The allegations contained in the complaint must be construed in the light most favorable to the plaintiff, and all material allegations in the complaint – as well as any reasonable inferences to be drawn from them – must be accepted as true. *See NL Indus., Inc. v. Kaplan*, 792 F.2d 896, 898 (9th Cir. 1986).

Dismissal for failure to state a claim is with leave to amend unless the court "determines that the pleading could not possibly be cured by the allegation of other facts." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir. 1995) (internal quotation marks omitted).

A. Standing

In the motion to dismiss, the Sheriff renews the contention that the named plaintiffs lack standing to bring the action. These arguments are addressed above with regard to the class certification and preliminary injunction motions. The Court concludes that even if the parole-hold of named plaintiff Vanke defeats his standing, the FAC adequately alleges the standing of the other named plaintiffs.

B. Merits

1. Over-Detention Resulting From Investigative Delay

The Court concludes that the FAC states a claim under § 1983 for violation of the Fourth Amendment right to be free from unreasonable seizure and the Fourteenth Amendment right to be free from deprivations of liberty without due process. As discussed in more detail above,

the Court concludes that a policy of delaying the administrative steps incident to the court-ordered release of a pretrial detainee in order to update files of newly arrived wants and holds without probable cause to believe that a want or hold exists for that particular released detainee violates the Fourth and Fourteenth Amendments. The complaint therefore states a claim for relief. The FAC alleges that the Department, by following its wants and holds policy, will prolong detentions beyond the time required for administrative processing of the plaintiffs' releases. (*See* FAC ¶¶ 10, 11, 16.)

2. Settlement Procedures

The plaintiffs also contend that the department policy of approaching over-detained individuals with settlement offers violates the Constitution and should be enjoined under § 1983. The complaint does not allege specifically what constitutional right is violated by approaching detainees with settlement offers. The plaintiffs' brief in opposition to this motion makes no effort to describe the constitutional violation.

There is a large body of law on the validity of § 1983 settlement agreements that are negotiated close to the time of violation. *See Town of Newton v. Rumery*, 480 U.S. 386 (1987). Such agreements are not void against public policy under federal law provided that the agreement is voluntary, that there is no evidence of prosecutorial misconduct, and that enforcement of the agreement would not adversely affect the public interests served by § 1983. *See id.* at 399; *Davies v. Grossmont Union High School Dist.*, 930 F.2d 1390 (9th Cir. 1991).

There is no law, however, on the question of whether a policy of offering such agreements violates the Constitution. The enforceability of § 1983 settlement agreements is not a matter of constitutional law, but rather an application of federal common law to the question of whether the settlement violates public policy. *See Newton*, 480 U.S. at 392; *Davies*, 930 F.2d at 1396.

The plaintiffs have not responded to the motion to dismiss with any theory as to how the Sheriff's settlement policy violates the Constitution. Although on a Rule 12(b)(6) motion the Court must make every inference in favor [sic] the plaintiffs, the Court need not accept as true the complaint's conclusory legal characterizations. *See Western Mining Council v. Watt*, 643 F.2d 618, 624 (9th Cir. 1981); Schwarzer, *supra*, § 9:226.2 (Rutter 1998). Here, the complaint simply alleges that the department approaches detainees with settlement offers. The complaint contains no allegations as to how such offers deprive the plaintiffs of a constitutional right. The plaintiffs in opposing this motion have pointed to no inferences arising from the complaint to support a constitutional violation. The Court deems the plaintiffs' silence as an abandonment of this claim. This claim is therefore dismissed with leave to amend.

V. CONCLUSION

The motion for a preliminary injunction is GRANTED. IT IS ORDERED that the defendants and their officers, agents, servants, employees, and all others in active concert or participation with them are enjoined during the pendency of this action from holding individuals who have been acquitted of the charges on which they are being held, or whose release has been ordered by a court, beyond

the period of time that is required to perform the administrative steps incident to release, including a check for wants and holds known[17] to the defendants at the conclusion of the administrative steps incident to release, but not including additional time for the receipt or processing of wants and holds not known to the defendants at the conclusion of the administrative steps incident to release.

This injunction is STAYED for sixty days after the filing date of this order.

The motion for class certification is GRANTED.

The motion to dismiss is DENIED as to the § 1983 claim based on over-detention, and GRANTED as to the § 1983 claim based on the settlement procedures. Any amended complaint reasserting this dismissed claim must be filed within 20 days of the filing date of this order.

Dated: 11-5-98

/s/ Dean D. Pregerson
DEAN D. PREGERSON
United States
District Judge

[17] For purposes of this order, "known" means already present in the defendants' jail computer system known as the Automated Justice Information System ("AJIS"), or through another electronic or manual records system comparable in access time to the AJIS.

APPENDIX D

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

R. VANKE, Plaintiff-Appellant, v. SHERMAN BLOCK; LOS ANGELES COUNTY BOARD OF SUPERVISORS; LEE BACA, Sheriff, Defendants-Appellees.	No. 02-55600 D.C. No. CV-98-04111-DDP Central District of California, Los Angeles ORDER
R. VANKE, Plaintiff-Appellee, v. LEE BACA, Sheriff, in his official capacity only, Defendant-Appellant.	No. 02-56472 D.C. No. CV-98-04111-DDP Central District of California, Los Angeles (Filed Nov. 17, 2003)

Before: KLEINFELD, WARDLAW, and W. FLETCHER, Circuit Judges.

The panel has voted to deny the petition for panel rehearing and petition for rehearing en banc.

(2)

No. 03-857

Supreme Court, U.S.
FILED
JAN 12 2004
OFFICE OF THE CLERK

In The
Supreme Court of the United States

R. VANKE, et al.,

Petitioners,

vs.

LEROY BACA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Rather than demonstrating any appropriate ground for review, Plaintiffs/Petitioners ("Plaintiffs") present the instant Petition for Writ of Certiorari by making various blatant misstatements of both fact and law. Pursuant to Rule 15 of the Rules of the United States Supreme Court, Defendant/Respondent Los Angeles County Sheriff Lee Baca ("Defendant") points out and addresses these misrepresentations.

The unpublished decision Plaintiffs seek review of is well-founded and consistent with the clear and unambiguous language of 42 U.S.C. § 1997e(d), the attorney's fees provisions of the Prison Litigation Reform Act ("PLRA"), and all prior cases that have applied this subsection. There is no conflict among the federal or state courts regarding the application of this particular subsection of the PLRA. In short, the standards of Rule 10 of the Rules of the United States Supreme Court have not been met and this Petition should be denied.

Plaintiffs in this case, on behalf of themselves and an alleged class of persons similarly situated, alleged that "it is probable that they and each of them will be held illegally in County custody after a judicial officer dismisses all then-pending criminal charges against plaintiffs, *for the prohibitive purpose of checking for warrants, wants, and holds*"[1] and sought equitable relief in this regard.

---

[1] The instant action was filed shortly after a decision in another matter handled by both counsel for Plaintiffs and counsel for Defendant herein, *Fowler v. Block*, U.S.D.C. Case No. CV 97-2098 WJR (Ex), was published. *Fowler v. Block*, 2 F.Supp.2d 1268 (C.D. CA 1998).

(Continued on following page)

In November of 1998, the District Court in the instant case issued an Order on Plaintiffs' motions for class certification and preliminary injunction and on Defendant's motion to dismiss. (Appendix, hereinafter "App." 27-72.) The District Court granted a preliminary injunction, based on the holding in *Fowler*, limited to precluding the Los Angeles County Sheriff's Department ("LASD")

> from holding individuals who have been acquitted of the charges on which they are being held, or whose release has been ordered by a court, beyond the period of time that is required to perform the administrative steps incident to release, including a check for wants and holds known to the defendants at the conclusion of the

---

Specifically, the plaintiff in *Fowler* alleged that he was overdetained in violation of his constitutional rights and sought damages for the alleged overdetention. The defendants in *Fowler* argued that the alleged overdetention was not a constitutional violation, but rather part of the necessary steps in performing the administrative discharge of an incarcerated person.

The Court in *Fowler* recognized that "[a]dministrative steps are a necessary part of an inmate's ordered release and can certainly be found reasonable under a qualified immunity analysis." *Id.* at 1277-78. Moreover, *Fowler* "recognize[d] that the administrative tasks incident to a release of a prisoner from custody may require some time to accomplish – in this case, perhaps a number of hours. Reasonable time must be allowed for such matters as transportation, identity verification, and processing . . . even if the current procedures are inefficient and time-consuming, they nonetheless must be undertaken incident to a person's release." *Id.* The Court even recognized that a delay of 24 to 48 hours "due to administrative release procedures cannot be found unreasonable," however, to the extent that there was evidence that defendant's administrative release procedures were delayed by an additional check for warrants and holds after the other administrative steps incident to release had been completed, the Court declined to award summary judgment. *Id.* at 1279.

> administrative steps incident to release, but not including additional time for the receipt or processing of wants and holds not known to the defendants at the conclusion of the administrative steps incident to release.[2]

(App. 71-72.)

Following the issuance of the preliminary injunction in November, 1998, the LASD modified its release procedures in accordance with the preliminary injunction and has been in compliance with the preliminary injunction ever since. (App. 2.) Moreover, the policies and procedures at the Los Angeles County Jail are continually improved and refined to expedite the entire release process and prevent detentions of inmates beyond their legal release date. (*Id.*) Indeed, the LASD has no intention of instituting any future policy or procedure that would have been prohibited by the preliminary injunction even though a subsequent Ninth Circuit decision found that the procedure prohibited by the preliminary injunction was in fact constitutional.[3] (*Id.*) The District Court ultimately dismissed the preliminary injunction as moot based on the modification of the relief procedures. (*Id.*)

---

[2] Consequently, and despite Plaintiffs' attempt to suggest that the relief granted was broader, the class of Plaintiffs in the instant case was and is so limited. A named plaintiff cannot represent a class alleging constitutional claims that the named plaintiff does not have standing to raise, and it is not enough that the class members share other claims in common. *O'Shea v. Littleton*, 414 U.S. 488, 493-94, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974); *Hawkins v. Comparet-Cassani*, 251 F.3d 1230, 1238 (9th Cir. 2001).

[3] *See, Brass v. County of Los Angeles*, 328 F.3d 1192, 1201 (9th Cir. 2003).

Plaintiffs filed a motion for an award of attorney's fees pursuant to 42 U.S.C. § 1988. Defendant opposed the motion on various grounds. Relevant to the Petition for Writ of Certiorari in the instant case, Defendant opposed the attorney's fees motion on the grounds that Plaintiffs failed to prove an *actual violation* of their rights as required by the PLRA, 42 U.S.C. § 1997e(d).

Based on its earlier ruling granting the preliminary injunction in which the District Court held that subsection (a) of the PLRA did not apply because the instant case did not involve "prison conditions," the District Court did not apply subsection (d) and awarded Plaintiffs attorney's fees.[4] (App. 5-26.) Defendant's opposition to the motion for attorney's fees, however, relied on a *different* section of the PLRA, subsection (d), which expressly applies to *any* action brought by "prisoners" regardless of whether or not it pertains to "prison conditions." The Ninth Circuit in the instant case correctly held that the District Court erred in bootstrapping its prior holding (based on the narrower subsection (a) of the PLRA) and not addressing the applicability of subsection (d) of the PLRA to Plaintiffs' motion for attorney's fees. (App. 3.) Subsection (d) of the PLRA, which applies to "any" action, bars Plaintiffs from obtaining attorney's fees because they never proved that their constitutional rights were "actually violated" as required

[4] In its Order granting the preliminary injunction, the District Court rejected Defendant's argument that subsection (a) of the PLRA should have applied to require that Plaintiffs exhaust their administrative remedies before filing the instant lawsuit. In doing so, the District Court found that the instant case did not relate to "prison conditions" and thus subsection (a) of the PLRA was not applicable. In its Order awarding attorney's fees, the District Court relied on its previous Order applying the narrower subsection (a) of the PLRA. (App. 16.)

by this provision. The Petition is therefore meritless because it mis-cites and misinterprets the PLRA by suggesting that the "prison conditions" limitation under subsection (a) of the PLRA applies to subsection (d) of the PLRA which, by its express language, applies to "any action."

Plaintiffs urge the Court to grant certiorari, contending that the unpublished Ninth Circuit decision below creates a conflict among the circuit courts. This is a blatant misrepresentation since the Second and Eighth Circuit cases cited by Plaintiffs did not address the specific subsection of the PLRA at issue in the instant case, 42 U.S.C. § 1997e(d). The cases relied upon by Plaintiffs all addressed the exhaustion of administrative remedies requirement under subsection (a) of the PLRA which, by its express language, applies to only prisoner suits involving "prison conditions," unlike the broader language under subsection (d) regarding attorney's fees limitations which applies in "any action." Plaintiffs have not and cannot point to any Circuit case that has held that subsection (d) of the PLRA only applies in "prison conditions" litigation.

ARGUMENT

I. THE UNPUBLISHED NINTH CIRCUIT DECISION BELOW APPLIED 42 U.S.C. § 1997e(d) BASED ON ITS EXPRESS LANGUAGE AND THE RULES OF STATUTORY CONSTRUCTION SET FORTH BY THIS COURT.

The PLRA was signed by the President on April 26, 1996 and was adopted in an attempt to quell the torrent of frivolous and abusive litigation conducted by prison inmates. The government's interest in enacting the PLRA

was "to curtail frivolous prisoners' suits and to minimize the costs – which are borne by taxpayers – associated with those suits." *See, Madrid v. Gomez*, 190 F.3d 990, 996 (9th Cir. 1999). Toward that end, the PLRA contains restrictions on the availability of attorney's fees for prisoner lawsuits.

Section 803(d) of the PLRA enacted 42 U.S.C. § 1997e, which significantly curtails the availability of attorney's fees and prison litigation under 42 U.S.C. § 1988. Under the PLRA, a prisoner who is a "prevailing party" under section 1988 is not presumptively entitled to an award of attorney's fees as are most section 1988 prevailing plaintiffs. Specifically, subsection (d)(1)(A) of 42 U.S.C. § 1997e expressly states that "fees shall *not* be awarded, *except* to the extent that – the fee was directly and reasonably incurred in *proving an actual violation of the plaintiff's rights* protected by a statute pursuant to which a fee may be awarded under section 1988 of this title . . . " (Emphasis added.) Reading the "prison conditions" limitation from *other* subsections of the PLRA into subsection (d) would render Congress' use of the modifier "any" in subsection (d) meaningless. The Ninth Circuit decision Plaintiffs seek review of applied the rules of statutory construction set forth by the Supreme Court and followed the clear and unambiguous language of subsection (d) of the PLRA (regarding limitations on attorney's fees awards) which, by its express terms, applies in "any action" brought by prisoners.

There is a presumption that Congress acted intentionally and purposefully in varying the modifier in subsection (d) of the PLRA to apply to "any" action, not just those involving "prison conditions." The rules of statutory construction dictate that subsection (d) of the PLRA not be limited to cases involving "prison conditions."

In resolving the question of statutory interpretation, courts must first look to the express language of the statute itself. *Bd. of Educ. of Westside Cmty. Sch. v. Mergens*, 496 U.S. 226, 237, 110 S.Ct. 2356, 110 L.Ed.2d 191 (1990); *Boivin v. Black*, 225 F.3d 36, 40 (1st Cir. 2000) ("We begin, as we must, with the language of the statute.") (citing *Bonilla v. Muebles J. J. Alvarez, Inc.*, 194 F.3d 275, 277 (1st Cir. 1999)). Statutes must be read in a "straightforward" and "commonsense" manner. *Hubbard v. United States*, 514 U.S. 695, 699-703, 115 S.Ct. 1754, 131 L.Ed.2d 779 (1995). *"Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." United States v. Gonzales*, 520 U.S. 1, 5-6, 117 S.Ct. 1032, 137 L.Ed.2d 132 (1997) (emphasis added).

Like the instant case, *Gonzales* involved interpretation of a statute with varying modifiers in its subsections. The particular subsection of the statute at issue in *Gonzales* contained the modifier "any" in the context of a statute that contained other subsections that were more restrictive. Rejecting the argument that the more restrictive language from the other subsections in the statute should be applied in the particular subsection at issue (Plaintiffs' argument in the instant case), the Supreme Court stated: "[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'" *Id.* at 5 (citing Webster's Third New International Dictionary 97 (1976).) Moreover, "[g]iven the straightforward statutory command, there is no reason to resort to legislative history." *Id.* at 6 (citing *Connecticut National Bank v. Germain*, 503 U.S. 249, 254, 112 S.Ct. 1146, 117

L.Ed.2d 391 (1992)). "Indeed, far from clarifying the statute, the legislative history only muddies the waters." *Id.*

Several years after *Gonzales*, the Supreme Court faced the same issue of statutory construction in *Gutierrez v. Ada*, 528 U.S. 250, 120 S.Ct. 740, 145 L.Ed.2d 747 (2000). Specifically, at issue was the language of the Organic Act of Guam, 48 U.S.C. § 1422. A number of limitations throughout the subsections of that Act refer to the term "general election" while the particular subsection at issue in the *Gutierrez* case refers to "any election." Noting that when Congress varies a modifier in a statute, it would hardly intend to mean the same thing under the subsection with the varied modifier, the Supreme Court applied the subsection to refer to "any election" notwithstanding the fact that many other provisions in the statute were limited to a "general election."

Applying the rules of statutory construction applied in *Gonzales* and *Gutierrez*, it is evident that Congress would not have used the language in subsection (d) of the PLRA "in *any* action" (emphasis added) if it meant to limit that provision to only cases involving prison conditions when it could have just as easily used the same language as other subsections (e.g., subsection (a)) of the PLRA. Plaintiffs' interpretation of subsection (d) renders Congress' use of the modifier "any" meaningless.

II. THE UNPUBLISHED NINTH CIRCUIT DECISION BELOW IS CONSISTENT WITH OTHER CASES APPLYING THE ATTORNEY'S FEES PROVISIONS OF THE PLRA UNDER 42 U.S.C. § 1997e(d).

Plaintiffs' suggestion that the Ninth Circuit decided the issue contrary to the clear statutory language and controlling precedent of this Court is a blatant misrepresentation. As set forth, *infra*, the clear and unambiguous language of the attorney's fees provisions of the PLRA indicates that these provisions apply in "any action" as opposed to other provisions of the PLRA which are limited to "prison conditions" litigation. Plaintiffs have not and cannot point to any decision by any court that has limited the applicability of subsection (d) of the PLRA to "prison conditions" litigation.[5] Such an application of the PLRA would ignore its express language.

The Fourth Circuit recently rejected an argument that Congress intended the restrictions on the recovery of attorney's fees to be applicable solely to prisoners and their lawyers bringing lawsuits challenging the *conditions of the prisoner's imprisonment*, holding that the argument was "at odds with the plain language of the statute." *See*, *Montcalm Publishing Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 171 (4th Cir. 1999). The Court then reiterated that the "PLRA expressly imposes limitations on the amount of attorney's fees awarded 'in any action brought

[5] None of the cases cited by Plaintiffs addressed the applicability of subsection (d) of the PLRA. To the contrary, the cases cited by Plaintiffs addressed other subsections of the PLRA, which are expressly limited to "prison conditions" litigation.

by a prisoner who is confined to any jail, prison, or other correctional facility.'" *Id.* at 171-72 (citing 42 U.S.C. § 1997e(d)(1)).

In fact, relying on *Gonzales* and its rule of statutory construction, the Ninth Circuit in *Oliver v. Keller*, 289 F.3d 623, 627-28 (9th Cir. 2002) applied the *plain language* of the PLRA to subsection (e) defining the term "physical injury." In this regard, the Ninth Circuit stated that "if Congress had meant that 'any' physical injury was sufficient to permit a prisoner's mental and emotional injury, it could have said as much." *Id.* at 627 (citing *United States v. Gonzales*, *supra*, 520 U.S. at 6.)

More on point to the instant case, and as further evidence that the PLRA's subsections act *independently*, prior to the instant case, the Ninth Circuit applied subsection (d) of the PLRA to a lawsuit that, by no stretch of the imagination, could be described as a "prison condition" lawsuit. *See*, *Siripongs v. Davis*, 282 F.3d 755 (9th Cir. 2002).

Like the instant case, the plaintiff in *Siripongs* obtained preliminary equitable relief, but there was never a finding that the plaintiff's rights were *actually violated*. In denying the plaintiff attorney's fees, *Siripongs* applied subsection (d) of the PLRA based on its plain meaning and implicitly rejected the assertion that the subsection applies only to lawsuits involving "prison conditions." In this regard, *Siripongs* held:

> In interpreting the [PLRA] statute we look to general principles of statutory construction and begin with the language of the statute itself. *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241, 103 L.Ed.2d 290, 109 S.Ct. 1026 (1989).

> Because we believe the PLRA's language is clear on its face, 'the sole function of the court [ ] is to enforce it according to its terms.' *Id.*

Id. at 758.

Consistent with the rules of statutory construction set forth by the Supreme Court in *Gonzales* and *Gutierrez*, and the application of the PLRA in *Siripongs*, it has been held that "the [PLRA] statute's provisions act *independently*" and, depending on the particular subsection of the statute at issue, may or may not be subject to the "prison conditions" limitation. *See*, *Turner v. Schultz*, 130 F.Supp.2d 1216 (D. CO 2001) (certain subsections of the PLRA apply to cases not involving prison conditions) (emphasis added).

The PLRA limitations on attorney's fees under 42 U.S.C. § 1997e(d) have been applied by courts to preclude an award of attorney's fees in cases like the instant case where a prisoner plaintiff may arguably be considered a "prevailing party," however, is not entitled to attorney's fees because there was never proof that the plaintiff's rights were ever "actually violated." *See*, *Siripongs*, *supra*.

Similarly, in *Waterman v. Farmer*, 84 F.Supp.2d 579 (D. NJ 2000), a class of plaintiffs challenged the constitutionality of a New Jersey statute and, in that regard, obtained an order preliminarily enjoining enforcement of the statute. Subsequently, the district court found the statute to be unconstitutional and *permanently enjoined* its enforcement. Thereafter, and before entry of judgment, the State of New Jersey published proposed rules clarifying the scope of the challenged statute so that it would be consistent with the court's injunction. Shortly thereafter, the plaintiff sought attorney's fees pursuant to

42 U.S.C. § 1988. Their argument was that "although they ultimately failed to obtain a judgment on the merits in their favor, their lawsuit was the 'catalyst' that prompted New Jersey officials to promulgate regulations clarifying the statute's scope." *Waterman*, *supra*, 84 F.Supp.2d at 582. Holding that the plaintiffs were not entitled to an award of fees, *Waterman* stated, in pertinent part:

> In making the determination as to whether a plaintiff is 'prevailing,' § 1988 *must be read in conjunction with the PLRA*. In doing so, it is clear that the PLRA conditions an award of attorney's fees in prisoner civil rights suits on a determination that a plaintiff's rights have actually been violated, thereby abrogating the judicially-created catalyst doctrine.
>
> The Court notes that under the normal rules of statutory construction, if Congress intends for legislation to change the interpretation of a judicially-created concept, it makes that intent specific. *See Astoria Fed. Sav. & Loan Ass'n. v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("Congress is understood to legislate against a background of common-law adjudicatory principles. . . . Thus, where a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident.") *Indeed, both the plain language of the PLRA and its legislative history demonstrate Congress' intent to eliminate the catalyst theory in prisoner civil rights cases.*

Waterman, *supra*, 84 F.Supp.2d at 586 (emphasis added). Subsection (d) of the PLRA "has the effect of reducing attorney fee awards by eliminating fees for litigation other

than that necessary to prove a violation of a federal right." *Id.* at 587 (citing H.R. Rep. No. 21, 104th Cong., 1st Sess. 1995).

More recently, in *Green v. Peters*, 2002 U.S. Dist. LEXIS 11671 (N.D. IL 2002), an inmate filed a lawsuit alleging that various prison officials violated his First Amendment rights by denying him access to various publications. Ultimately, the parties entered into a consent decree that prohibited the defendants from restricting inmates' access to certain non-legal publications. The defendants then adopted a rule which was found in violation of the consent decree. Consequently, the court then issued a permanent injunction. Denying attorney's fees, however, *Green* stated that a "plain reading of this language [referring to subsection (d) of the PLRA] makes clear that the PLRA conditions an award of attorney's fees in prisoner civil rights cases on a determination that the prisoner's rights *have actually been violated*." *Id.* at *26-27 (citing *Waterman, supra*, 84 F.Supp.2d at 586.)

The Ninth Circuit in the instant case applied subsection (d) of the PLRA "according to its terms" and consistent with the prior applications of this section in *Waterman*, *Green* and *Siripongs*. Plaintiffs have not and cannot point to any binding precedent that has held that *subsection (d)* of the PLRA is limited to "prison conditions" litigation.

III. CONCLUSION.

While certain subsections of the PLRA do not apply to non-prison conditions litigation, based on its express language and the rules of statutory construction set forth by the Supreme Court, subsection (d) clearly does. Accordingly, the Ninth Circuit correctly applied subsection (d) of

the PLRA in finding that Plaintiffs were precluded from an award of attorney's fees. Based on the foregoing, certiorari should be denied.

Respectfully submitted,

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January 12, 2004

(3)

No. 03-857

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In The
Supreme Court of the United States

R. VANKE, et al.,

Petitioners,

vs.

LEROY BACA,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

In *Martin v. Hadix*, 527 U.S. 343 (1999) (opinion by Justice O'Connor), this Court defined fully and conclusively the phrase "any action" as it is used in Section 1997e(d) of the Prison Litigation Reform Act of 1995 (the "PLRA"). In so doing, this Court made pellucid that the phrase "any action" as used in Section 1997e(d) means any action subject to that entire Section, 1997e, of which subsection 1997e(d) is but a part.

Specifically, this Court made clear that ***when*** actions in fact are subject to Section 1997e, then subsection 1997e(d) sets "substantive" limits on an award of attorneys' fees. But subsection 1997e(d) does ***not*** control when prison actions are subject to Section 1997e in the first instance, by the subsection's inclusion of the phrase "any action." The word "any" in the phrase "any action" means "any action that is subject to Section 1997e in the first instance." Because only prisoner cases involving prison conditions are subject to Section 1997e in the first place, therefore, because the instant action does not involve prison conditions in the first instance, therefore, this action is subject neither to Section 1997e nor to subsection 1997e(d).

As this Court held, "we believe that § 803(d) [codified at subsection 1997e(d)] is better read as setting substantive limits on the award of attorney's fees." *Martin*, 527 U.S. at 353. But, if an action is not subject to Section 1997e at all, as is the case here, then, by *modus ponens*, it is not subject to subsection 1997e(d) at all. Put another way, by *Martin's* reasoning, subsection 1997e(d) does not define which classes of cases are subject to Section 1997e, and for any prison case to be governed by subsection 1997e(d) it first must be subject to Section 1997e itself.

In doing that, this Court made clear that the subsection, 1997e(d), the attorneys' fees subsection of the entire section, 1997e, does ***not*** define the class of cases subject to Section 1997e(d) that are covered by the entire Section, 1997e.

In simple, the phrase "any action" as contained in Section 1997e(d) means any action subject to the entire section, 1997e, of which subsection 1997e(d) is but one part. But subsection 1997e(d) and its use of the phrase "any action" is not determinative of which cases are subject to subsection 1997e(d), or the entire Section, 1997e.

According to this Court, Section 1997e(d) applies to "any action" which already is subject to the main Section, 1997e, but that the subsection, 1997e(d), does not govern which actions are subject at all to Section 1997e. The provisions and construction of the entire Section 1997e do that.

Thus, this Court defined the phrase "any action" in its ordinary language sense, gave plain meaning to the statute as written, and interpreted that provision in light of the overall statutory scheme of the PLRA and the policies and purposes underlying the PLRA, which argument is made in the Petition herein.

ARGUMENT

This case involves the meaning of one word within a specific provision of the "PLRA." The issue in this case is whether it is within the class of cases governed by the PLRA, and specifically, whether the instant case is subject to the attorney fees limitation imposed by one subsection of the PLRA. In order to understand the meaning of the one word at issue in this case, "any," a sense of the breadth of the statutory scheme of which it is a part is helpful. The PLRA was the 1996 enactment of PL 104-134, 1996 HR 3019. It was a sweeping piece of legislation that included amendments to existing statutes and added new statutes. Section 803 of the PLRA amended 42 U.S.C. § 1997e, which addresses civil remedies for deplorable ***prison conditions***. Section 802 of the PLRA amended 18 U.S. § 3626, which governs the granting of and termination of injunctive relief in civil actions challenging ***prison conditions***. The PLRA also added new provisions, including a

"three-strikes" rule, in order to quell vexatious inmate litigants and broadened the courts' powers summarily to dismiss certain inmate civil actions. *See* 28 U.S.C. § 1915(g), added by § 804 of the PLRA.

At issue in this case is whether an award of attorneys' fees in this case is limited by Section 803(d) of the PLRA, which is codified at 42 U.S.C. § 1997e(d). Section 1997e(d) provides, in relevant part:

> (d) Attorney's Fees
>
> (1) In **any action brought by a prisoner who is confined** to any jail, prison, or other correctional facility, in which attorney's fees are authorized under [42 U.S.C. § 1988], such fees shall not be awarded, except to the extent that –
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> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under [42 U.S.C. § 1988]; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> (2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, [the Criminal Justice Act,] for payment of court-appointed counsel. 42 U.S.C. § 1997e(d) (herein referred to as § 803(d) or § 1997e[d]).

At issue in this case is the immediately preceding bolded phrase: **any action brought by a prisoner who is confined**. Respondent's argument is that the word "any," as it is used in § 803(d), codified at 42 U.S.C. § 1997e(d)(1), means "every." In *Martin*, the Court ruled that "all" does not mean "every." There, the Court determined to what extent § 803(d) of the PLRA applied to an award of attorneys' fees for work performed in a prison case both before and after the effective date of the Act. And, in deciding that issue, this Court defined the word "any," as used in § 1997e(d), to mean attorneys' fees incurred in prison condition cases that were filed before the effective date of the Act, and in which an entitlement to attorneys' fees was claimed for services rendered after the effective date of the Act, but not for services rendered prior to the effective date. Unlike this case, *Martin* involved prisoner lawsuits which challenged prison conditions. However, as in this case, the issue was the scope of § 803(d), and particularly the phrase "'[i]n *any* action *brought by a prisoner who* is *confined*[.]'" *Martin*, 527 U.S. at 352 (emphasis in original). At issue in *Martin*, as in issue in the instant case, was whether that phrase, particularly its use of the word "any," defined the class of cases subject to § 803(d). The Court rejected the argument posed by the respondent here that because "any" is a broad, encompassing word, § 803(d) applies to **all** prisoner actions, and specifically held that the fee limitations of § 803(d) did **not** apply to "*all* fee awards entered after the PLRA became effective." *Ibid.* (emphasis in original). The Court acknowledged that the "word 'any' is broad, [but ruled that] it *stretches the imagination to suggest that Congress intended, through the use of this* ***one*** *word, to make the fee limitations applicable to* ***all*** *fee awards. Id.* at 354 (emphases added).

This is dispositive of the issue on the instant petition.

Martin held that the phrase "any action" contained in § 1997e(d) does not define what cases are subject to the attorney fee limitations of that provision. 527 U.S. at 353-54. The Court held that § 1997e(d) only sets the conditions

on the recovery of attorneys' fees and the amount of recoverable attorneys' fees, but that that section does not establish what cases are subject to its limitations. *Ibid.* In reaching this conclusion, the Court defined the word "any" by reference to other words in § 803(d) of the PLRA and to other sections of the PLRA, specifically § 802, which is codified at 18 U.S.C. § 3236, and that governs injunctive relief in civil actions challenging prison conditions. Rejecting the broad meaning of "all" and declining to find that the word "all" meant "every," the Court held that the phrase "any action" as employed in § 1997e(d) did not define what actions are subject to that provision. Instead, when read in context, § 1997e(d) merely defines the limits on the recovery of amounts of attorneys' fees in the actions that ***are subject to that provision*** and makes those limits applicable to all cases that already are subject to that provision. *Id.* at 353-54. The Court gave meaning to the word "any." It did not ignore it. This Court properly construed subsection 1997e(d) as imposing attorneys fees limits on all cases subject to Section 1997e, and properly found that § 1997e(d), despite its use of the phrase "any action," ***did not define the class of cases within the words used in that subsection or the main Section, 1997e.*** Therefore, in this case, the Court properly should use the same approach in defining the scope of the word "any." The Court encountered no difficulty in limiting the scope of the word "any," and a similar analysis in this case would indicate that interpretation of the word "any" should be conducted in the same manner in this case.

Rather than interpreting the word "any" based on its inclusion in but one phrase of § 803(d), *i.e.*, in a vacuum apart from the rest of the statutory scheme, the Court interpreted the word "any" by reading that word in context with the remaining language of that Section, as well as by reference to other sections of the PLRA. In interpreting the word "any" in this manner, the Court found that § 803(d) did ***not*** apply to every prison case. *Martin*, 527 U.S. at 354. The Court found that § 1997e(d) did ***not*** define what actions were subject to that provision, but only defined what the limits on attorneys' fees are in

actions that are subject to § 1997e(d) and the PLRA. *Martin*, 527 U.S. at 353-54. Therefore, in this case, the word "any" properly should be interpreted as those prisoner lawsuits that successfully challenge ***prison conditions***. The word "any" properly does not mean every prisoner lawsuit, but means only cases properly governed by the PLRA that, in fact, actually have to do with ***prison conditions***. Because the instant case has nothing to do with prison conditions, therefore, the word "any" refers to PLRA cases and does not apply in this case. Properly interpreted, the word "any" in § 803(d) is not a reference to all cases filed by prisoners, but instead references only prisoner cases that involve prison conditions.

In *Martin*, the Court employed basic rules of statutory construction: no one word or phrase in a section of a statute may be read in a vacuum apart from the rest of that section or the PLRA because such a reading violates the canon of construction that "the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989). Read in its proper context, it is clear that § 803(d) does not apply to prisoner lawsuits which do not challenge prison conditions, notwithstanding the one particular seemingly all encompassing phrase relied on by the respondent, here. The word "any" must be read in its proper context. *See Martin*, 527 U.S. at 352-56. It must be read by looking at the rest of the language of the particular statute, as well as in context and consonance with the purpose and design of the statutory scheme of which it is apart, in this case, the PLRA.

Respondent does not and cannot quarrel with the District Court's finding in this case that the exhaustion requirement of the PLRA codified at § 1997e(a), did *not* apply to this case because this case is not a prison condition case. Respondent does not and cannot quarrel that this case is not a prison condition case. Rather, respondent contends that because the phrase "any action" is in a different subsection of the same section of the PLRA, to

wit, § 1997e(d), as opposed to § 1997e(a), it nonetheless applies to this case although it is not a prison condition case. Respondent's argument contravenes the requirement that the phrase "any action" as used in one subsection of the PLRA must be read in context with the purpose and policies of the PLRA, as well as the statutory scheme as a whole, as the Court held in *Martin.* When the phrase "any action" properly is read with reference to the PLRA's "full text, language as well as punctuation, structure and subject matter," *United States Nat'l Bank v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 455 (1993) (internal quotation marks omitted), and properly interpreted in light of not only to "the particular statutory language at issue, [but also] . . . the language and design of the statute as a whole," *K-Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291 (1988), it is clear that the attorneys' fees provision, § 1997e(d) does not apply to every prisoner lawsuit, but only those that challenge prison conditions. As this Court held in *Martin*, the phrase "any action" as used in § 1997e(d) does not define the class of cases subject to the attorney fee limitations imposed by that subsection. *Martin*, 527 U.S. at 353-54. Rather, § 1997e(d) applies to "any action" subject to its provisions. *See id.*

As explained in petitioner's opening brief, the language and design of the PLRA, a sweeping statutory scheme, as a whole, belies any contention that the phrase "any action" as used in one subsection of one statute which is a part of such a broad statutory scheme can be read without a view to the purposes of that statutory scheme. Petitioner has explained that the statutory scheme known as the PLRA was aimed at prisoner lawsuits which challenge prison conditions. A proper reading of the phrase "any action" which is contained in § 1997e(d) requires consideration of the context of the purposes and design of the PLRA. That purpose and design, as explained in the opening brief, was to curtail and to regulate prisoner lawsuits which challenge prison conditions. This case does not challenge prison conditions and therefore it is not governed at all by the PLRA. And, the phrase "any action"

which is contained in but one subsection of one statute of the statutory scheme of the PLRA is not determinative of whether this action is within the scope of the PLRA and the attorney fee limitations set forth at § 1997e(d). *See Martin*, 527 U.S. at 353-54.

Respondent's reliance on *Montcalm Publishing Corp. v. Commonwealth of Virginia*, 199 F.3d 168, 171 (4th Cir. 1999) is misplaced. Respondent suggests that the Fourth Circuit held that the phrase "any action" extends the scope of the attorneys' fees limitations set by § 1997e(d) to every action filed by a prisoner, even an action which does not challenge prison conditions. However, *Montcalm* involved an action brought by two prisoners which challenged prison conditions. "Unquestionably, the case at hand is one 'brought by a prisoner.' Indeed, two prisoners, Hodges and Flora, initiated this case; Montcalm merely intervened. Thus, application of [§1997e(d) of] the PLRA is inescapable." *Id.* at 172. Therefore, *Montcalm* is neither relevant or apposite to the issue before the Court because that case clearly involved a challenge to prison conditions which was initiated by prisoners. This case does not.

Similarly, each of the other cases relied on by respondent for the proposition that the word "any," as used in § 1997e(d), means "every" and, therefore, means that every action filed by a prisoner that is subject to the attorney fee limitations set forth in § 1997e(d), are inapposite because each of those cases involves a lawsuit which challenged ***prison conditions***. The citation of all of those cases begs the question in this case, because each of those cases assumes that the action falls within the PLRA because prison conditions were involved. *Waterman v. Farmer*, 84 F.Supp.2d 579 (D. N.J. 2000), involved a prisoner's right of access to pornography while in prison. *Green v. Peters*, 2002 U.S. Dist. LEXIS 11671 (N.D. Ill. 2002), cited by respondent, also involved a prisoner's right of access to various publications. *Turnev v. Schultz*, 130 F.Supp.2d 1216 (D. Co. 2001) involved the use of excessive

force by prison guards on a prisoner. These cases indisputably all are prisoner lawsuits filed to challenge prison conditions, precisely the type of cases subject to § 1997e, including the attorney fee limitations imposed by § 1997e(d). *See Martin*, 527 U.S. at 347 (access to vocational and educational opportunities, access to courts all are prison conditions); *id.* at 349 (mail, court access, sanitation, and other aspects of prison life); *Porter v. Nussle*, 534 U.S. 516 (2002) (isolated used of excessive force by a prison guard on a prisoner is a prison condition). Thus, all of these cases are not determinative of or even relevant on this issue in this case, to wit, whether the phrase "any action," as used in one subsection of a section of the PLRA, defines what lawsuits are within the scope of that entire Section.

Respondent's reliance on *Siripongs v. Davis*, 282 F.3d 755, 757 (9th Cir. 2002), is unavailing. *Siripongs* involved the issue of whether plaintiff had been a "prevailing party." Specifically, it involved the issue of whether the plaintiff was a prevailing party entitled to attorneys fees who, although he obtained a temporary restraining order preventing his execution, had been refused a preliminary injunction, and became the quintessential losing party when he was executed. Unlike the plaintiff in *Siripongs,* here, plaintiffs indisputably obtained a preliminary injunction enjoining the respondent from engaging in its unconstitutional practices, which were not prison conditions. Unlike anything that occurred in *Siripongs*, the respondent here changed its practices admittedly as a result of the preliminary injunction. Respondent claims that the action in *Siripongs* did not involve prison conditions. However, there, plaintiff had filed a lawsuit challenging the denial of his right of due access to clemency proceedings. *Siripongs*, 282 F.3d at 756-57. This Court has held that lawsuits challenging court access are prison condition cases. *See Martin*, 527 U.S. at 349. Therefore, *Siripongs* which involved an action challenging the denial of due process rights in a prisoner's petition for clemency involved a prisoner lawsuit which challenged prison

conditions and properly was subjected to the PLRA and its provision limiting recovery of attorneys fees in prison condition lawsuits.

Here, Section 1997e(d) is ***in***applicable at all because the instant action involved the fact of confinement, but it did not involve any condition of confinement or prison condition.

Moreover, plaintiffs did plead and prove the "actual violation of the plaintiff's rights," which Section 1997e(d)(1) makes a predicate for an award of fees in prisoner cases that do involve prison conditions, and thus, even if this Section were to apply, there is an entitlement to attorneys' fees.

CONCLUSION

Certiorari should be granted for the reasons set forth in the Petition, to resolve the important national question of whether or not the attorneys' fees provision contained in subsection 1997e(d) defines the entire scope of the main Section of which it is a part, Section 1997e, and is applicable to prisoner suits that do ***not*** involve prison conditions, and to bring the errant Ninth Circuit into conformity with the PLRA and this Court's and other court's PLRA holdings.

Alternatively, the court below should be summarily reversed. *See, e.g., City of Los Angeles v. Heller*, 475 U.S. 796 (1986).

Respectfully submitted,

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